CLERK'S COPY.

114

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 622

GENERAL INSURANCE COMPANY OF AMERICA,
PETITIONER,

vs.

NORTHERN PACIFIC RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1929

CERTIORARI GRANTED FEBRUARY 25, 1929

(33,931)

(33,931)

SUPREME COURT OF THE UNITED STATES

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. HOWE & GRAHAM, Attorneys for Appellant,

856 Stuart Building, Seattle, Washington.

C. H. WINDERS, Esquire, Attorney for Appellee,

909 L. C. Smith Building, Seattle, Washington. [1*]

UNITED STATES OF AMERICA.

In the United States District Court for the Western District of Washington, Northern Division.

No. 11,162.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

SUMMONS.

The President of the United States of America, GREETING: To the Above-named Defendant, Northern Pacific Railroad Company, a Corporation.

YOU ARE HEREBY REQUIRED to appear in the United States District Court, in and for the

*Page-number appearing at the foot of page of original certified Transcript of Record.

Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above-named plaintiff, now on file in the office of the Clerk of said court, in the city of Seattle, a copy of which complaint has been delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

WITNESS, the Honorable JEREMIAH NETERER, Judge of said court, this 6th day of December, in the year of our Lord one thousand nine hundred and twenty-six, and of our Independence the one hundred and fifty-first.

[Seal] ED. M. LAKIN,
Clerk.
By T. W. Egger,
Deputy Clerk.

HOWE & GRAHAM,
For Plaintiff. [2]

MARSHAL'S RETURN.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the within summons on the therein named Northern Pacific Railway Company, by handing to and leaving a true and correct copy thereof with A. G. Kinsman, General Agent Passenger Department,

personally, at Seattle, in said District, on the 6th day of December, A. D. 1926.

E. B. BENN,
U. S. Marshal.
By A. B. Miller,
Deputy.

Marshal's Fees: $2.06.

[Endorsed]: Filed Dec. 7, 1926. [3]

In the United States District Court for the Western District of Washington, Northern Division.

No. 11,162.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT.

For a first cause of action against the defendant, plaintiff complains and alleges:

I.

That plaintiff, General Insurance Company of America, is, and at all times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Washing-

ton, and engaged in the business of insuring property owners against loss by damage by fire, and that it has paid its current annual license fee as required by law.

II.

That the Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation, duly organized under the laws of the State of Wisconsin, and engaged in operating a railroad in and through the Station of Badger, County of Benton, and State of Washington.

III.

That on the 22d day of February, 1926, in consideration of a yearly premium to it paid, the plaintiff executed and issued to one Peter Agor, a citizen and resident of the State of Washington, hereinafter called "Insured," a policy of insurance [4] numbered Wn. 508520, insuring said "Insured" in the sum of $12,000.00 against loss or damage by fire to wool and sacks, while contained in a certain warehouse situated at Badger Station, Benton County, Washington, all the property of said "Insured" when said policy was issued, and located in said warehouse building.

IV.

That on the 2d and 3d days of May, 1926, and while said policy of insurance was in full force and effect, the said wool and sacks, then of a value of $10,240.95, were totally destroyed by fire which said fire was negligently started by defendant, in the manner hereinafter alleged, on the 2d day of

May, 1926, at about the hour of 9:50 o'clock P. M. by sparks, cinders or live coals from a locomotive owned and then and there operated by the defendant, Northern Pacific Railway Company, a corporation, on its said railroad, to the damage of said "Insured" in the sum of $10,240.95; that said locomotive was so negligently constructed and operated as to permit and cause sparks, cinders or live coals to escape therefrom and to start a fire which spread to said wool and sacks, stored in said warehouse hereinbefore mentioned.

V.

That by reason of said fire, plaintiff became liable under said policy of insurance to pay, and did on the 14th day of May, 1926, pay to the said "Insured" the loss resulting therefrom, to wit, the sum of $10,240.95.

VI.

That said policy hereinabove referred to contained a provision to the effect that said General Insurance Company of America, a corporation, shall on payment of any loss be subrogated to the extent of such payment in the event that the fire was [5] caused by the act or neglect of any person or corporation to all right of recovery by the "Insured" for the loss resulting therefrom. That by reason of the said payment plaintiff became subrogated to all of the rights of said "Insured" against said defendant Northern Pacific Railway Company, a corporation, arising from said fire and damage to the full extent of said payment and contemporaneously with making said payment plain-

tiff received from said "Insured" a certain assignment and subrogation receipt in words and figures as follows, to wit:

"SUBROGATION RECEIPT.

Received of the General Insurance Company of America, of Seattle, Washington, by the hand of R. W. Dent Insurance Agency, Agent at Yakima, Washington, the sum of Ten Thousand Two Hundred Forty and 95/100 Dollars being in full of all claims and demands for loss and damage by fire on the 3rd day of May, 1926, to the property insured by Policy No. Wn. 508520 issued at the Yakima, Washington Agency of said Company, and in consideration of such payment the undersigned hereby assigns and transfers to the said Company each and all claims and demands against any person, persons, corporation, or property, arising from or connected with such loss or damage (and the said company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, corporation or property in the premises) to the extent of the amount above named.

Dated this 14th day of May, 1926, at Yakima, Wash.

PETER AGOR. (Signed.)

Witness: R. W. DENT. (Signed.)"

For a second cause of action against defendant, plaintiff complains and alleges:

I.

That plaintiff General Insurance Company of

America is, and at all time herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and engaged in the business of insuring [6] property owners against loss by damage by fire, and that it has paid its current annual license fee as required by law.

II.

That the Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation, duly organized under the laws of the State of Wisconsin, and engaged in operating a railroad in and through the Station of Badger, County of Benton, State of Washington.

III.

That on the 22d day of February, 1926, in consideration of a yearly premium to it paid, the plaintiff executed and issued to one Peter Agor, a citizen and resident of the State of Washington, hereinafter called "Insured," a policy of insurance numbered Wn. 508679, insuring said "Insured," in the sum of $12,000.00 against loss or damage by fire to wool and sacks, while contained in a certain warehouse situated at Badger Station, Benton County, Washington, all the property of said "Insured" when said policy was issued and located in said warehouse building.

IV.

That on the 2d and 3d days of May, 1926, and while said policy of insurance was in full force and effect, the said wool and sacks, then of a value

of $10,240.95, were totally destroyed by fire which said fire was negligently started by defendant, in the manner hereinafter alleged, on the 2d day of May, 1926, at about the hour of 9:50 o'clock P. M., by sparks, cinders or live coals from a locomotive owned and then and there operated by the defendant, Northern Pacific Railway Company, a corporation, on its said railroad, to the damage of said "Insured" in the sum of $10,240.95; that said locomotive was so negligently constructed and operated as to permit and cause sparks, cinders or live coals [7] to escape therefrom and to start a fire which spread to said wool and sacks, stored in said warehouse hereinbefore mentioned.

V.

That by reason of said fire plaintiff became liable under said policy of insurance to pay, and did on the 14th day of May, 1926, pay to the said "Insured" the loss resulting therefrom to wit, the sum of $10,240.95.

VI.

That said policy hereinafter referred to contained a provision to the effect that said General Insurance Company of America, a corporation, shall on payment of any loss be subrogated to the extent of such payment in the event that the fire was caused by the act or neglect of any person or corporation, to all right of recovery by the "Insured" for the loss resulting therefrom. That by reason of the said payment plaintiff became subrogated to all of the rights of said "Insured" against said defendant Northern Pacific Railway

Company, a corporation, arising from said fire and damage to the full extent of said payment and contemporaneously with making said payment plaintiff received from said "Insured" a certain assignment and subrogation receipt in words and figures as follows, to wit:

"SUBROGATION RECEIPT.

Received of the General Insurance Company of America, of Seattle, Washington, by the hand of R. W. Dent Insurance Agency, Agent at Yakima, Washington, the sum of Ten Thousand Two Hundred Forty and 95/100 Dollars, being in full of all claims and demands for loss and damage by fire on the 3rd day of May, 1926, to the property insured by Policy No. Wn. 508679 issued at the Yakima, Washington Agency of said company, and in consideration of such payment the undersigned hereby assigns and transfers to the said company each and all claims and demands against any person, persons, corporation or property, arising from or connected with such loss or damage, (and the Company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, corporation or property in the premises) to the extent of the amount above named.

Dated this 14th day of May, 1926, at Yakima, Wash. [8]

PETER AGOR. (Signed.)

Witness: R. W. DENT." (Signed.)

WHEREFORE, plaintiff prays for judgment against said Northern Pacific Railway Company, a corporation, in the amount of Ten Thousand Two Hundred Forty and 95/100 Dollars ($10,240.95) on its first cause of action, and in the amount of Ten Thousand Two Hundred Forty and 95/100 Dollars ($10,240.95) on its second cause of action, or a total of Twenty Thousand Four Hundred Eighty-one and 90/100 Dollars ($20,481.90), together with interest thereon at the rate of six per cent (6%) per annum from May 14th, 1926, together with the costs of suit, and for such other relief as may be proper.

HOWE & GRAHAM,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

H. K. Dent, being first duly sworn, on oath deposes and says: That he is President of General Insurance Company of America, a corporation, plaintiff herein; that he makes this verification on behalf of said plaintiff; that he has read the foregoing complaint; knows the contents thereof and believes the same to be true.

H. K. DENT.

Subscribed and sworn to before me this 8th day of October, 1927.

[Seal] FELIX F. KURZ,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed Oct. 10, 1927. [9]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for answer to the complaint of the plaintiff, denies, admits and alleges as follows, to wit.

I.

Denies that it has any information sufficient upon which to base a belief as to the allegations set forth in Paragraph III of the first cause of action in said complaint, and consequently denies the same.

II.

Denies each and every allegation in Paragraph IV of the first cause of action in said complaint, and the whole thereof, excepting that it admits on information and belief that certain wool belonging to one, Peter Agor, in a warehouse at Badger Station, Wash., was destroyed by fire about the time therein alleged. [10]

III.

Denies that it has any knowledge or information sufficient upon which to base a belief as to the allegations contained and set forth in Paragraphs V and VI of said first cause of action in said complaint, and consequently denies the same and the whole thereof.

IV.

Denies that it has any knowledge or information sufficient upon which to base a belief as to the

allegations contained in Paragraph III of the second cause of action set forth in said complaint, and consequently denies the same.

V.

Denies each and every of the allegations alleged and set forth in Paragraph IV of the second cause of action in said complaint, and the whole thereof, excepting only that it admits upon information and belief that certain wool and sacks in a warehouse at Badger Station, Wash., were destroyed by fire at about the time referred to therein.

VI.

Denies that it has any information sufficient upon which to base a belief as to the allegations contained in Paragraphs V and VI of the second cause of action in said complaint, and consequently denies the same.

VII.

Denies further that plaintiff has been damaged in the sum of $10,240.95 on account of the first cause of action, and in the sum of $10,240.95 on account of the second cause of action, or a total of $20,481.90 and interest as alleged [11] in said complaint, or in any other sum, or in any other amount, or at all.

WHEREFORE this defendant having fully answered prays that this action be dismissed, and that it may go hence without day and have and recover of and from the plaintiff its costs and disbursements herein to be taxed, and such other and further relief as to the Court may seem meet

and equitable and consistent with the proofs upon a hearing hereon.

GEO. T. REID,
C. H. WINDERS,
Attorneys for Defendant.

United States of America,
District of Washington,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant and makes this verification on its behalf, being authorized so to do, said defendant being a foreign corporation; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

C. H. WINDERS.

Subscribed and sworn to before me Dec. 28, 1926.

[Seal] BRUCE JENNINGS,
Notary Public in and for the State of Washington, Residing at Seattle. [12]

[Endorsed]: Received a copy of the foregoing answer this 29th day of December, 1926.

HOWE & GRAHAM,
Attorneys for Pltff.

[Endorsed]: Filed Dec. 29, 1926. [13]

[Title of Court and Cause.]

STIPULATION THAT ANSWER TO COMPLAINT MAY BE CONSIDERED AS ANSWER TO AMENDED COMPLAINT.

It is hereby stipulated by and between the parties hereto that plaintiff may file its amended complaint and that defendant's answer, heretofore served and filed, may apply and be considered as the answer of defendant to said amended complaint.

Dated at Seattle, Washington, this 8th day of October, 1927.

HOWE & GRAHAM,

Attorneys for General Insurance Company of America, a Corporation.

GEO. T. REID,

C. H. WINDERS,

Attorneys for Northern Pacific Railway Company, a Corporation.

[Endorsed]: Filed Oct. 10, 1927. [14]

[Title of Court and Cause.]

ORDER ALLOWING FILING OF AMENDED COMPLAINT.

Now on this 10th day of October, 1927, upon stipulation of the parties hereto, an order is entered allowing the filing of an amended complaint.

Journal No. 15, page 491. [15]

[Title of Court and Cause.]

TRIAL.

Now, on this 4th day of November, 1927, this cause comes on for trial, Howe and Graham appearing for the plaintiff and C. H. Winders appearing for the defendant. Both sides are ready. A jury is impaneled and sworn as follows: Ray W. Clough, Fred Fourtner, Charles J. Leclair, Fred Miller, Carlos D. Bradley, W. E. Barker, C. W. Croasdill, Jr., Richard G. Bushell, P. H. Price, W. J. Brounty, Elsie M. Knapp, and LeRoy E. Scofield. The counsel for the plaintiff makes the opening statement to the jury, the counsel for the defendant reserving an opening statement. The witnesses for the plaintiff are sworn and examined as follows: H. Fernandez, Hugh Palmer, B. Agor, and R. W. Dent. The plaintiff's exhibits numbered 1 to 5, inclusive, are admitted in evidence. The defendant's exhibit numbered "A–1" is admitted in evidence. The plaintiff rests. The counsel for the defendant moves for a nonsuit. The jury is excused until 2 o'clock P. M. The motion is argued and granted, an exception is noted. At 2 o'clock P. M., the jury is discharged from the case and judgment of dismissal is signed.

Journal No. 15, page 604. [16]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 11,162.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

JUDGMENT.

BE IT REMEMBERED that this cause came on duly and regularly for trial on the 4th day of November, 1927, having been regularly continued from time to time from the 27th day of October, 1927, the plaintiff appearing by its attorneys, James B. Howe and Donald Graham, and the defendant appearing by its attorneys, Geo. T. Reid and C. H. Winders, and a jury having been duly and regularly impaneled and sworn to try said cause, and plaintiff having introduced its evidence and rested, and the defendant having interposed a motion for judgment of nonsuit, on the ground that the plaintiff had failed to show any facts sufficient upon which to justify the submission of the issues of the case to the jury, or to show negligence on the part of the defendant as alleged, or at all, and said motion having been duly presented

to the Court, and the Court being fully advised in the premises, grants the same and directs that this action be dismissed; [17]

WHEREFORE, IT IS HEREBY ORDERED that the motion for nonsuit interposed by the defendant be, and it is hereby, granted, and this action be, and it is hereby, dismissed, and that the defendant do have and recover of and from the plaintiff its costs and disbursements herein to be taxed; to all of which the plaintiff excepts and its exception is allowed.

Done in open court this 4th day of November, 1927.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Nov. 4, 1927. [18]

[Title of Court and Cause.]

STATEMENT OF COSTS AND DISBURSEMENTS TO BE TAXED IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF.

				Taxed
Clerk's Costs			$10.00	5.00
Attorneys' Fees, statutory			20.00	20.00
Witness Fees:				
Theo. Peterson,	Pasco, Wash.	7 days 506 mi.	39.30	21.50
D. W. Kerr,	"	7 " 506 "	39.30	21.50
G. H. Hazzard,	"	7 " 506 "	39.30	21.50
Art. Salagianis,	Yakima, Wash.	7 " 326 "	30.30	21.50
Art. Partch,	Pasco, Wash.	7 " 506 "	39.30	21.50
Geo. Havanis,	Yakima, Wash.	7 " 326 "	30.30	21.50
Edw. Donnelly,	Pasco, Wash.	7 " 506 "	39.30	21.50
H. Hanson,	Spokane, Wash.	7 " 798 "	53.90	21.50
D. C. Putnam,	Pasco, Wash.	7 " 506 "	39.30	21.50

				Taxed
Jacob Jacobsen,	Pasco, Wash.	7 days, 506 mi	39.30	21.50
Stephen Fairfield,	"	7 " 506 "	39.30	21.50
Alfred Anderson,	"	7 " 506 "	39.30	21.50
N. J. Jacobs,	"	7 " 506 "	39.30	21.50
F. L. Preston,	Spokane, Wash.	7 " 798 "	53.90	21.50
W. R. Thompson,	Pasco, Wash.	7 " 506 "	39.30	21.50
M. E. Temple,	"	7 " 506 "	39.30	21.50
Hugh Palmer,	"	7 " 506 "	39.30	21.50
O. C. McDermett	"	7 " 506 "	39.30	21.50
[19]	Forwarded		$748.60	412.00
	Forwarded		$748.60	Taxed 412.00
Everett Young,	Pasco, Wash.	7 days, 506 mi.	39.30	21.50
S. George,	"	7 " 506 "	39.30	21.50
T. W. Balke,	"	7 " 506 "	39.30	21.50
B. O. Bucklin,	"	7 " 506 "	39.30	21.50

				Taxed
B. C. King,	St. Paul, Minn.	7 days, 826 mi (Wash. State Line)	53.30	21.50
V. Gamble,	Spokane, Wash.	7 " 798 mi.	53.90	21.50
A. W. Schroeder,	Pasco, Wash.	1 " 506 "	27.30	21.50
W. B. Norton,	Seattle, Wash.	7 " 2 "	14.20	14.10
Mr. Fisher,	"	7 " 2 "	14.20	14.10
Mr. Ryno,	"	7 " 2 "	14.20	14.10
	Total		$1,084.90	604.80

Taxed at $604.80 Nov. 14, 1927, and appeal taken therefrom *instanter* and same tentatively set for hearing Wednesday afternoon, Nov. 16, 1927.

ED. M. LAKIN,
Clerk.
By S. E. Leitch,
Deputy.

GEO. T. REID,
C. H. WINDERS,
Attorneys for Defendant.

Items of fees as to Hanson, Jacobs, Preston, Fisher & Ryno, stricken and disallowed by court order Jan. 26, 1928.

$604.80
92.70

Retaxed at $512.10
Jan. 26, 1928.

ED. M. LAKIN,
Clerk.
By S. M. H. Cook,
Deputy. [20]

United States of America,
District of Washington,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, and as such had charge of the trial of this action on its behalf, and has full knowledge of the facts in connection with the taxation of the foregoing costs, and states the fact to be that the items set forth in the foregoing cost bill are correct, and

that the disbursements therein set forth have been necessarily incurred in this suit, and the several witnesses enumerated were in attendance in Seattle, as witnesses in the above-entitled action, from Thursday morning, October 27, 1927, up to and including Friday, November 4, 1927, and that each of said witnesses, with the exception of the witnesses Norton, Fisher and Ryno, reside at such a distance from Seattle as would prohibit their returning thereto from day to day.

Affiant further states the fact to be that the defendant was required to pay as fees to said witnesses for their attendance sums largely in excess of the statutory witness fees and mileage, as set forth in the foregoing cost bill.

C. H. WINDERS.

Subscribed and sworn to before me November 7, 1927.

[Seal] BRUCE JENNINGS,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Received a copy of the foregoing cost bill this 8th day of November, 1927.

HOWE & GRAHAM,
Attorneys for Ptff.

[Endorsed]: Filed Nov. 8, 1927. [21]

[Title of Court and Cause.]

OBJECTIONS OF PLAINTIFF TO DEFENDANT'S STATEMENT OF COSTS AND DISBURSEMENTS.

Comes now the plaintiff above named, General Insurance Company of America, a corporation, and objects to the items of costs and disbursements contained in defendant's statement as follows, to wit:

I.

Objects to having said statement of costs and disbursements taxed in any item whatsoever upon the ground that said statement is not supported by an affidavit, as required by Rule No. 70, Rules of United States District Court, for the District of Washington, and by Section No. 1625, Compiled Statutes of the United States, in that there is no statement or showing contained in the said statement, or the affidavit accompanying same, that the services charged therein had been actually and necessarily performed, as therein stated.

Without waiving the preceding objection, the plaintiff further objects: [22]

II.

Plaintiff objects to all the items in said statement covering witness fees and mileage upon the ground that there is no showing made in said statement, or the affidavit accompanying same, that the attendance of the witnesses mentioned therein was proper, as required by Rule No. 70, Section 7–a.

Rules of United States District Court for the District of Washington, and upon the additional ground that there is no showing that the testimony of any or all of said witnesses, if called for, would have been material or that their personal attendance was necessary in lieu of taking their depositions, and further on the ground that none of said witnesses testified on behalf of defendant.

III.

Objects to taxation or allowance of witness fees or mileage to any witness except Art Salagianis, George Havanas, W. R. Thompson, M. E. Temple, H. Palmer, B. C. Bucklin, S. George and T. W. Balke, on the ground that all other witnesses mentioned in said statement are not material witnesses and were unnecessarily present.

IV.

Objects to taxation of witness fees and mileage to more than three (3) witnesses present to testify as to any fact or issue.

V.

Objects to the allowance to any witness of witness fees in excess of one (1) day on the ground that none of said witnesses were in proper attendance for more than one (1) day, and upon the additional ground that the trial of the above-entitled cause was completed in one (1) day.

VI.

Objects to the allowance to any of said witnesses of [23] witness fees for the 29th, 30th and 31st of October on the ground that said witnesses were

not in proper attendance, or in any attendance whatsoever, in court upon said dates.

VII.

Objects to the taxation of mileage for any of the witnesses mentioned in said statement in the amounts as claimed, and to any mileage for any witness in excess of one hundred fifty (150) miles, upon the ground, as shown by said statement, that each of said witnesses—except the last three (3) listed in said statement—attended from eastern points without this District and that the distance from Seattle to the eastern boundary limit of this district along the route actually and necessarily traveled by each of said witnesses does not exceed seventy-five (75) miles, this being the maximum of mileage allowance as fixed by Rule No. 70, Section 7–b, Rules of the United States District Court for the District of Washington.

VIII.

Objects to the allowance of Clerk's costs in the sum of Ten Dollars ($10.00) on the ground that the docket fails to show the incurring of costs to the Clerk by defendant in excess of $5.00.

IX.

Objects to mileage allowance of witnesses Norton, Fisher and Ryno of more than ten cents (10¢) each.

Objections above made are supported by the affidavit of Donald G. Graham hereto attached.

HOWE & GRAHAM,
Attorneys for Plaintiff. [24]

United States of America,
District of Washington,—ss.

Donald G. Graham, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff, General Insurance Company of America, a corporation, and makes this affidavit for and in behalf of said plaintiff; that he has had charge of the trial of this action on behalf of said plaintiff; that the distance from Seattle to the eastern boundary limit of the District of Washington along the line and route actually and necessarily traveled by the witnesses referred to in defendant's statement of costs is approximately seventy-five (75) miles; affiant further states that according to his information and belief all the witnesses mentioned in said statement—except Art Salagianis, George Havanas, W. R. Thompson, M. E. Temple, H. Palmer, B. C. Bucklin, S. George and T. W. Balke, were immaterial and unnecessary witnesses in that they could not have had any knowledge of facts, or be called upon to testify as to any material fact, in the trial; that the witnesses just referred to were the two (2) railroad employees residing and present at the scene of the fire and the other excepted witnesses were the train crew, including two engineers, two firemen, conductor and brakeman of the train that passed through Badger Station immediately before the fire; and affiant believes and therefore states that said witnesses were the only witnesses summoned by defendant who could offer material testimony in reference to the

issues raised by the pleadings; that counsel for defendant, C. H. Winders, stated to affiant that he had caused twenty (20) witnesses including two (2) full train crews to appear but that he did not intend to use them, but simply wanted them present to avoid any criticism in not having summoned them; that Counsel made substantially [25] the same statement in open court to the Honorable George Bourquin, Judge; that in any event the second train crew could have no knowledge of the facts or circumstances connected with the negligence of defendant or of the fire; affiant further states that plaintiff was ready to proceed to trial on October 27th, 1927, the date this case was set for trial and that its adjournment and continuance during the succeeding period was through no fault or through any request of plaintiff; that any witnesses of defendant, if present during the period stated in the affidavit accompanying defendant's statement, was not present more than a few minutes upon each day, to wit: October 27th, October 28th, November 1st, second and third, and that none of said witnesses were in attendance on October 29th, 30th and 31st, the Court having adjourned the case shortly after 10:00 A. M., on the morning of October 28th, to 10:00 A. M., November 1st, 1927; that on November 3d, 1927, counsel for defendant procured a resetting of said case before the Honorable Jeremiah Neterer, Judge, for November 4th, 1927, and that for said setting said witnesses of defendant were only in attendance one (1) day, to wit: November 4th, 1927. Affiant further states that

each and all of said witnesses mentioned in defendant's statement, except the three (3) witnesses residing in Seattle, were excused on Friday, October 28th, at about 10:00 A. M., and could have returned to their homes and there spent the intervening time until Tuesday morning, November 1st, 1927, and that affiant states on information and belief that each and all of said witnesses are employees of defendant corporation, and as such could have made said trip without incurring any expenses for railroad fares and that the distance said witnesses resided from Seattle would not, in fact, prohibit their returning to their homes during said interim. Affiant further states, on information and belief, that [26] defendant's statement lists a grossly excessive number of witnesses and an allowance of fees and mileage for all of said witnesses is an unreasonable burden upon plaintiff, particularly in view of the fact that counsel, by his own statement, did not intend to use all of said witnesses and was told by Judge Bourquin that he would not be allowed to use any such number of witnesses when he made the statement to Judge Bourquin in open court that he had twenty (20) witnesses attending and awaiting the trial.

DONALD G. GRAHAM.

Subscribed and sworn to before me this 10th day of November, 1927.

[Notarial Seal] LIONEL J. BOURKE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Nov. 11, 1927. [27]

[Title of Court and Cause.]

AFFIDAVIT OF C. H. WINDERS IN REPLY TO AFFIDAVIT OF DONALD G. GRAHAM AND IN SUPPORT OF COST BILL.

United States of America,
District of Washington.—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, and as such prepared and verified the original cost bill on file herein.

That engines 1616 and 1618, pulling a freight train, passed the scene of this fire between 9:40 and 9:50 P. M. on the night of the fire as set forth in the complaint, while the train passing said warehouse immediately prior thereto was a passenger train, NP. 333, which arrived at Kiona at 8:38 P. M. on the same day.

That the witnesses enumerated in the cost bill of the defendant were either members of the train crews of the double-header freight train, or on passenger train 333, or of the mechanical department who had inspected the two freight engines and one passenger engine. [28]

That Theo. Peterson was the conductor on engine 1618.

D. W. Kerr was road foreman of engines of the defendant on the Pasco Division, on which the fire complained of occurred, and as such had charge

of all engineers while out on the road. He is a man of many years' experience, familiar with the three engines which might have been drawn into this controversy, familiar with their construction and method of maintenance, and also with the records of the various enginemen on said engines.

G. H. Hazzard is the roundhouse foreman of this defendant at Pasco. He personally inspected both freight engines the morning after the fire.

Art. Salagianis was a section foreman of this defendant at Badger, and the first person who discovered the fire.

Art. Partch was a building and bridge inspector of the defendant, and was the defendant's representative sent to the scene of this fire the morning after the fire, and knows of existing conditions.

Geo. Havanis was a section laborer, who was present at the time of the fire.

Edw. Donnelly, Jacob Jacobsen, Stephen Fairfield and Alfred Anderson, were boiler makers and inspectors at Pasco and inspected the two freight engines in question, some of them one and some of them the other, prior to their leaving the roundhouse on the day of the fire and after the return of the engines to the roundhouse at Pasco. H. Hanson, mechanical inspector at Pasco, who inspected the engine pulling train 333. [29]

D. C. Putnam was dispatcher at Pasco. He received the first word of the fire and made the train sheet covering the movement of trains at the time of this fire, which train sheet the plaintiff asked the defendant to produce.

N. J. Jacobs was the engineer, between Pasco and Ellensburg, on the night of this fire on the engine pulling train 333.

F. L. Preston was conductor on train 333, which passed through Badger on the night of the fire.

W. R. Thompson was the engineer on the night of this fire on engine 1618.

M. E. Temple was the fireman on engine 1616.

Hugh Palmer was the fireman on engine 1618.

O. P. McDermett and Everett Young were both brakemen on the freight train pulled by engines 1616 and 1618.

S. George was the engineer on engine 1616.

T. W. Balke was a brakeman on the freight train pulled by engines 1616 and 1618.

B. O. Bucklin was the conductor on engine 1616.

B. C. King was general boiler and safety inspector of the Northern Pacific System. He made a large size model of an engine for the purpose of demonstrating the construction of the fire prevention devices thereon. He was called and retained for approximately two weeks, for the purpose of acting as an expert witness.

V. Gamble was a civil engineer. He prepared a plat showing the station at Badger Station, which was identified at the time of the trial. [30]

Mr. Fisher, a mechanical inspector, inspected the engine pulling train 333, which passed the scene of this fire the night of the fire, after it reached Seattle.

Mr. Ryno was the engineer who operated the engine of train 333 from Ellensburg to Seattle on the

same trip this train was operated on the night of the fire.

W. B. Norton is a retired safety inspector of the Northern Pacific System, employed for years in connection with federal inspectors; was master mechanic for years, is familiar with engine construction and fire prevention devices, and was retained as an expert.

A. W. Schroeder was the fireman on train 333, which passed through Badger on the night of the fire.

Each of the witnesses enumerated above, being brakemen, engineers, firemen, conductors or trainmen, were on engines 1618, 1616, or on the train being pulled by said engines, or on train 333, as the same passed through Badger on the night of the fire referred to in the plaintiff's complaint, and in the opinion of affiant each of said witnesses were material witnesses, and the defendant could not have safely proceeded with the trial of this case without their presence. That each of them knew of the method of operation of the engines and the trains in question, and as to conditions incident to the equipment being used, and as to the physical facts as they existed on the night of the fire referred to in the plaintiff's complaint.

That each of the employees of the mechanical department were, in the opinion of affiant, necessary and [31] material witnesses, they being the representatives of the defendant who examined the engines which passed the scene of this fire immediately prior thereto. That each one of said in-

spectors, excepting as to the two freight engines, examined only one thereof, either on its outward or inward trip, the two freight engines being examined by one of said witnesses on the night of the fire. That when the mechanical department was notified of the fire, both of said engines were thoroughly examined by the roundhouse foreman and three other mechanical boiler makers at Pasco.

That the other witnesses enumerated were, in the opinion of affiant, necessary and material witnesses, and that all of said witnesses were called to testify to material facts in connection with the defense of this action.

With reference to the affidavit of Donald G. Graham, wherein inference is made that this affiant stated that he did not intend to call all of said witnesses, affiant states the facts with reference thereto to be as follows, to wit:

That in preparing for the trial of this case, affiant felt it would be unsafe to go to trial without the presence of each and all of the witnesses enumerated in said cost bill, and who actually attended, as set forth therein.

That when this case was being continued from day to day, affiant set forth that he had in the neighborhood of thirty, not twenty, witnesses, and Judge Bourquin stated [32] it was doubtful if so many witnesses would be heard, and affiant stated that it might be that it would not be necessary to call all of such witnesses; and affiant made substantially the same statement to Judge Neterer, before whom this case was tried, stating that in a

fire case such as set forth in the complaint herein, the defendant could not tell accurately exactly what might be developed, and that it might be that some of the witnesses who were being held would not be called. Affiant made substantially the same statement to Donald G. Graham.

That the expense to the railway company in bringing each of said witnesses to the trial of this case greatly exceeded, in each instance, the amount that could in any event be taxed as costs.

Referring to such cost bill, affiant did not ask for any fees for Saturday, Sunday or Monday, referred to in said affidavit of Donald G. Graham, although the fact is that none of said witnesses were able to return to work, for the reason that by the time they reached their place of work they would not have sufficient time to go out with their respective crews.

That the mechanical men, other than those in Seattle, could not work, because they would not reach their place of work until Saturday, too late to go to work, and they were required to leave their place of work prior to the close of the workday on Monday. That notwithstanding such fact, affiant, on behalf of the defendant, did not claim costs for such three days. [33]

With reference to the crew on train 333, while that train went through Badger Station between 8 and 9 o'clock on the night of the fire, affiant had no means of knowing if an attempt would not be made to saddle some responsibility of such train, and it would seem to affiant utterly beyond physical

belief to believe that a fire, such as is referred to in plaintiff's complaint, could start in such a short time after the two freight engines passed, and as a matter of precaution he felt, from experience in trials of cases of this character, that he would be subject to very great criticism if such train crew was not available, although affiant intended, if plaintiff tied itself down definitely to the two freight engines, not to offer their evidence, but affiant had no assurance such would be the developments in the case.

C. H. WINDERS.

Subscribed and sworn to before me November 12, 1927.

[Seal] BRUCE JENNINGS,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Nov. 12, 1927. [34]

[Title of Court and Cause.]

ORDER ON APPEAL FROM THE DECISION OF THE CLERK IN RE TAXATION AND COSTS.

Appeal being taken by plaintiff orally *instanter* on the 12th day of November, 1927, from the decisions of the Clerk of the District Court in and for the above-entitled Division and District and the hearing upon said appeal having been set over for argument to January 23, 1928, and argument being

had thereon upon said date, based upon plaintiff's objections to defendant's statement of costs and disbursements except objections numbered 7, 8, and 9, it appearing that all of said objections except objections 7, 8, and 9 were overruled and denied by said Clerk; and it appearing to the Court that witnesses H. Hansen, N. J. Jacobs, F. L. Preston, Fisher and Ryno were not material witnesses and were unnecessarily present, being employees of a train crew of a train which passed through Badger Station about 8:00 o'clock in the evening of the day of the fire. It is, therefore,

ORDERED, that plaintiff's objections to defendant's statement of costs and disbursements as taxed by the Clerk being numbered objections 1, 2, 3, 4, 5, and 6, be, and each of them are hereby, denied except that objection number three (3) is granted to the extent that the allowance of any witness fees or mileage to witnesses H. Hanson, N. J. Jacobs, F. L. Preston, Fisher and [35] Ryno is set aside and denied upon the grounds above stated and the Clerk of the District Court is directed to strike from the allowance and taxation of costs, heretofore made, the witnesses' fees and mileage of said five witnesses, and the remaining items of costs as taxed by the Clerk are approved, to all of which—except as to the striking of fees and mileage of said five witnesses—plaintiff excepts and its exceptions are hereby allowed.

Done in open court this 26 day of January, 1928.

JEREMIAH NETERER,

Judge.

O. K. as to form.

C. H. W.

HOWE & GRAHAM.

[Endorsed]: Filed Jan. 26, 1928. [36]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the plaintiff and respectfully petitions the Court for an order granting to it a new trial in the above-entitled cause for the following causes materially affecting the substantial rights of plaintiff, to wit:

I.

Irregularity in the proceedings of the Court and the entry of judgment and order of nonsuit by the Court and abuse of discretion by the Court by which plaintiff was prevented from having a fair trial.

II.

In sufficiency of the evidence to justify the order and judgment of nonsuit, to wit: Proof of facts and circumstances justifying an inference that the fire in question originated from defendant's locomotive, thus rendering the ground upon which nonsuit was granted untenable.

III.

Errors in law occurring at the trial, to wit: Refusal of the Court to allow interrogation by plaintiff of witness Dent in reference to admissions made by Salagianis, employee of defendant; [37] also in

granting motion of defendant for nonsuit and entry of order and judgment therefor.

This petition is based upon the pleadings and papers, including among others the exhibits, together with the minutes of the court and the reporter's transcript of testimony.

HOWE & GRAHAM,
Attorneys for Plaintiff.

United States of America,
District of Washington,—ss.

Donald G. Graham, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff and makes this verification for and on behalf of plaintiff; that he has read the foregoing petition; knows the contents thereof and believes the same to be well founded and that same is not made for the purpose of delay.

DONALD G. GRAHAM.

Subscribed and sworn to before me this 15th day of November, 1927.

[Seal] LIONEL J. BOURKE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Received copy of within and service acknowledged this 15 day of Nov., 1927.

C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed Nov. 16, 1927. [38]

[Title of Court and Cause.]

ORDER DENYING PETITION FOR NEW TRIAL.

The above-entitled cause coming on for hearing upon plaintiff's petition for a new trial on January 23, 1928, the parties being present in court by and through their respective counsel and argument being had thereon and the Court being fully advised in the premises, it is hereby,

ORDERED that plaintiff's petition for a new trial be, and it is hereby, denied, to all of which plaintiff excepts and its exceptions are allowed.

Done in open court this 26 day of January, 1928.

JEREMIAH NETERER,
Judge.

O. K.—C. H. W.
O. K. as to form.

HOWE & GRAHAM.

[Endorsed]: Filed Jan. 26, 1928. [39]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Northern Pacific Railway Company, a Corporation, and C. H. Winders, Its Attorneys:

You, and each of you, are hereby notified that General Insurance Company of America, a corporation, plaintiff above named, by and through its attorneys, Howe & Graham, appeals from the judg-

ment made and entered in the District Court of the United States for the Western District of Washington, on November 4, 1927, and from each and every part thereof. Said appeal being to the United States Circuit Court of Appeals for the Ninth Circuit.

HOWE & GRAHAM,
Attorneys for Plaintiff.

[Endorsed]: Received a copy of the foregoing notice of appeal this 12th day of April, 1928.

C. H. WINDERS,
J.,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 13, 1928. [40]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the plaintiff in the above-entitled cause and files the following assignment of errors, upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the judgment made by this Honorable Court on the 4th day of November, 1927:

I.

The Court erred in granting motion of defendant for a nonsuit on November 4, 1928, to which ruling the plaintiff duly excepted, which error resulted in preventing the jury from considering and passing upon and deciding the issue of fact presented by

plaintiff's complaint and sustained by the witnesses testifying in favor of plaintiff, which said issue was whether the defendant, through its agents and servants negligently caused the fire which destroyed plaintiff's property; also upon the additional ground that the Court had no jurisdiction to grant said motion for a nonsuit. [41]

II.

The Court erred in entering judgment of nonsuit and dismissal on said 4th day of November, 1927, which error resulted in preventing the jury from considering and passing upon and deciding the issue of fact presented by plaintiff's complaint and sustained by the witnesses testifying in favor of plaintiff, which said issue was whether the defendant, through its agents and servants negligently caused the fire which destroyed plaintiff's property; also upon the additional ground that the Court had no jurisdiction to grant said motion for a nonsuit.

III.

The Court erred in entering order denying plaintiff's petition for a new trial on January 26, 1928, upon the grounds set forth in said petition.

IV.

The Court erred in sustaining objections to questions put to the witness R. W. Dent as to what admissions or statements were made by Salagianis, employee of defendant at the scene of the fire, in reference to how and when he first saw the fire; to the sustaining of which objections, an exception was duly taken by plaintiff.

V.

The Court erred in refusing to sustain plaintiff's objections numbered 1, 2, 4, 5 and 6, and a portion of objection numbered 3 to defendant's statement of costs and disbursements as taxed by the Clerk, upon the grounds set forth in said objections.

WHEREFORE, plaintiff prays that the judgment rendered and entered against it in this cause on November 4, 1927, in [42] favor of the defendant, may be reversed and set aside and a new trial granted to plaintiff.

HOWE & GRAHAM,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 13, 1928. [43]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, General Insurance Company of America, as principal, and American Surety Company of New York, as sure*ties*, are held and firmly bound unto Northern Pacific Railway Company, a corporation, in the sum of One Thousand and no/100 ($1,000.00) Dollars, lawful money of the United States, to be paid to it, and its respective assignees or successors; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, by these presents.

SEALED with our seals and dated this 12th day of April, 1928.

WHEREAS the above-named General Insurance Company of America, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse and correct the judgment of the District Court for the Western District of Washington, Northern Division, in the above-entitled cause: [44]

NOW, THEREFORE, the condition of this obligation is such that if the above-named General Insurance Company of America, a corporation, shall prosecute its said appeal to effect and answer all costs, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GENERAL INSURANCE COMPANY OF AMERICA.

By HOWE & GRAHAM,
Its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK.

By S. H. MELROSE,
Resident Vice-President.
E. F. KIDD, (Seal)
Resident Asst. Secretary.

The within bond is approved both as to sufficiency and form, this 13th day of April, 1928.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Apr. 13, 1928. [45]

[Title of Court and Cause.]

BILL OF EXCEPTIONS. [46]

[Title of Court and Cause.]

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[47—1]

[Title of Court and Cause.]

PROCEEDINGS HAD NOVEMBER 4, 1927.

BE IT REMEMBERED, that heretofore and on, to wit, November 4, 1927, at the hour of 10 o'clock A. M., the above-entitled cause came regularly on for trial in the above court, and before the Honorable Jeremiah Neterer, one of the Judges of said court, sitting with a jury.

The plaintiff appearing by James B. Howe, Esq., and Donald G. Graham, Esq., of Messrs. Howe & Graham, its attorneys and counsel.

The defendant appearing by C. H. Winders, Esq., its attorney and counsel.

WHEREUPON the jury having been duly empaneled and sworn, the following proceedings were had and done, to wit: [48—2]

Mr. GRAHAM.—May it please the Court and lady and gentlemen of the jury. The evidence of the plaintiff in this case will show that on May 2d, 1926, a warehouse at the station of Badger, Benton County, Washington, was destroyed by fire. This is a station which has no inhabitants—no business houses and even the station itself does not have an agent—a station agent—a ticket agent. The only inhabitants are two railroad employees and one employee of Peter Agor, who owned the wool which was in the warehouse. The warehouse was totally destroyed by the fire and the wool contained therein was burned and destroyed. The wool was of the

value of over twenty thousand dollars—between twenty and twenty-one thousand dollars.

The evidence will show that this wool was owned by a man in the sheep business by the name of Peter Agor; that he stored the wool in the warehouse and that immediately prior to the breaking out of the fire a train operated on the main line of the defendant—the Northern Pacific Railway Company—passed through. This train was a freight train, approximately seventy cars, drawn by two engines. The evidence will show that immediately—before reaching the station of Badger there is a heavy up grade for a distance of some five or six miles; that the trains coming up this grade labor heavily and emit large quantities of sparks—live coals and cinders from the smokestack.

The evidence will show that the fire was discovered immediately after the train went through and at that time was just in the process of getting started hard. [49—3] That at the time of the fire there was a heavy wind blowing from the direction toward the warehouse from the track. In other words, as the train passed by the wind was coming in a direction to blow any emission of sparks, live coals or cinders toward the warehouse which was a distance of about approximately thirty or forty feet away from the track.

The evidence will show that the fire started at the base of the warehouse on the side closest to the track and that the day and the climate and the weather were such that everything was as dry as tinder and that weeds and other combustible ma-

(Testimony of Higinio Fernandes.)

terials were blowing around and had collected at the base of the warehouse.

The evidence will further show that there is no other probable or possible cause for this fire than that it was caused by sparks or live cinders, communicated from the defendant's engine, and the evidence will further show that the communication of these sparks and live coals and cinders under the circumstances present in this case constituted negligence on the part of the defendant.

The cause of action which the owner of the wool acquired by the destruction of his wool is assigned to the plaintiff in this case, the General Insurance Company, who paid to him the full amount—the full value of the wool and took from him an assignment of his cause of action against the railroad company.

Mr. WINDERS.—With your Honor's permission, I will reserve my statement at this time.

The COURT.—Yes. Call your first witness. [50—4]

TESTIMONY OF HIGINIO FERNANDES, FOR PLAINTIFF.

HIGINIO FERNANDES, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your name. A. Higinio Fernandes.

Q. What nationality are you, Mr. Fernandes?

(Testimony of Higinio Fernandes.)

A. Spanish.

Q. How long have you been in this country?

A. About thirteen years.

Q. What has been your occupation since you have been in this country? A. Herding sheep.

Q. Sheep—herding sheep? A. Yes, sir.

Q. During May, 1926, by whom were you employed? A. By Mr. Peter Agor.

Q. By Pete Agor? A. Yes, sir.

Q. And how long had you been employed by Mr. Agor?

A. I had been employed about six years—close to about six years.

Q. Under what arrangements were you employed? What were your duties?

A. My duties—I took charge of that place down there from the first of the year 1926. I was down there as head man for the outfit.

Q. You were head man? [51—5]

A. Yes, sir.

Q. And where were you living—where were you staying?

A. I stayed down at Badger most of the time.

Q. At Badger? A. Yes, sir.

Q. Now, in May—the latter part of April and the first part of May what particular work were you doing at Badger? A. That was lambing time.

Q. Lambing? A. Yes, sir.

Q. And where did you live at Badger?

A. Right there in the shack that they have got right there at Badger.

(Testimony of Higinio Fernandes.)

Q. In a shack? A. Yes, sir, or a cabin.

Q. Now, where was this shack in relation to the warehouse at Badger?

A. Oh, it is about—well, I would say about 150 yards from the warehouse.

Q. 250 yards?

A. 150 yards. I am not sure just what it was.

Q. You will have to speak a little louder, Mr. Fernandes. I cannot hear you well back here. About 150 yards you say?

A. Something like that, yes.

Q. And was it on the same side of the track as the warehouse? A. Yes, sir, on the east side.

Q. On the east side? A. Yes, sir.

Q. Now, the tracks run in what direction through Badger? [52—6]

A. The tracks run north and south.

Q. And this warehouse—how many feet was it away from the main tracks of the railroad?

A. Why, I don't know. About fifty feet—about.

Q. About fifty feet? A. Yes, sir.

Q. Did you ever measure it? A. No.

Mr. WINDERS.—Then I move to strike the answer, if the Court please. He does not know.

Mr. GRAHAM.—Well, he can give the best of his recollection—

Mr. WINDERS.—(Interrupting.) I think not. I think that is a matter that he must be sure about. I have a plat here. Now, your Honor, here is an insurance company that has investigated this thing from one end to the other—

(Testimony of Higinio Fernandes.)

Mr. GRAHAM.—I do not think that your objection requires a stump speech.

The COURT.—How is that?

Mr. GRAHAM.—If counsel wants us to use his plat I will be very pleased to use it.

The COURT.—Very well.

Mr. WINDERS.—I move that the answer of the witness be stricken. There is a way to get at these things and I might add that I did not mean to make any stump speech.

Mr. GRAHAM.—I object to counsel's argument. I do not think that he should argue to the jury.

The COURT.—What was the witness' answer? [53—7]

(Question and answer read as follows: "Q. Did you ever measure it? A. No.")

The COURT.—I do not think that should be stricken. He says that he did not measure it, that is all.

Mr. GRAHAM.—Counsel remarked that he had a plat. If he will produce that we will be pleased to avoid any guessing as to distances.

Mr. WINDERS.—Well, I offered it to you the other day and I give it to you now. In putting the plat on the easel I would respectfully suggest that it might be well to put the north at the top.

(Plat is put on easel.)

Q. What had you been doing during the day of May 2d? By the way, what day of the week was that? A. It was a Sunday.

(Testimony of Higinio Fernandes.)

Q. A Sunday? A. Yes, sir.

Q. What had you been doing during the day?

A. That day we went up to see some sheep that was up on a hill.

Q. That was up where?

A. Up on a hill, after dinner.

Q. Now, where did you have dinner—when did you have dinner? A. About twelve o'clock.

Q. And when did you come back to the station?

A. Well, I don't know. About half-past four or four o'clock. I ain't sure what time it was.

The COURT.—In the evening?

The WITNESS.—In the evening, yes, sir. [54—8]

Q. Half-past four in the afternoon, do you say?

A. About four or half-past four.

Q. And what was the condition of the weather? Had it rained or had it been dry for some time previous to May 2d? A. It had been dry.

Q. And what was the—was there a wind or was it quiet? A. At noon there was a wind blowing.

Q. There was a wind blowing? A. Yes, sir.

The COURT.—You might ask him which way.

Q. What direction—which way?

A. It was a west wind.

Q. A west wind? A. Yes, sir.

Q. You speak about a west wind? You mean it was coming from the west?

A. Yes, coming from the west.

Q. Going towards the east? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. And what did you do when you came back to the cabin about 4:30?

A. I don't remember now. I know as close as I can tell that we had supper. The section foreman called to have supper in my cabin.

Q. Was he section foreman on the Northern Pacific Railway? A. Yes, sir.

Q. And he lived at this station also?

A. Yes, sir.

Q. Step down and point out on the plat, Mr. Fernandes, where [55—9] your cabin was and where the section foreman's cabin was and who else lived at this station.

A. Another employee of the railroad.

Q. Do you know his name?

A. I know it to be George.

Q. George? A. Yes, sir.

Q. Outside of those three were you the only people there at the station that day? A. Yes, sir.

Q. Just the three of you? A. Yes, sir.

Q. Now, point out with a pointer—can you read, Mr. Fernandes? A. Yes. I can read a little.

Q. Well, can you find on this plat—can you find there where the—

A. (Interrupting.) This is where the station foreman stayed.

Q. This is where the station foreman stayed (indicating)? A. Yes, sir.

The COURT.—Have him mark those in some sort of fashion on the plat.

(Testimony of Higinio Fernandes.)

Mr. GRAHAM.—We will mark that point "A."

The COURT.—He is marking your exhibit up, Mr. Winders.

Mr. WINDERS.—Oh, that is all right. I have no objection.

(Mr. Graham marks point "A" on plat.)

Q. Can you point out on this map where George stayed? [56—10] A. This map is upside down?

Q. This map is upside down? A. Yes, sir.

Q. Well, we will put it the other way.

A. It seems to me that we can get at it better this way (indicating). This is upside down.

Q. Now, after turning the map around again, where was George's cabin?

A. George was across the track, around here some place (indicating). This is Saligandus (indicating)?

Q. Yes.

A. This is where the other fellow is supposed to be.

Mr. WINDERS.—The names are on there.

A. Well, I cannot read it upside down. It is around in there some place.

Mr. GRAHAM.—Mark that point "B"—this has not been identified as an exhibit. Shall we call this Defendant's Exhibit "A"?

Mr. WINDERS.—That is all right with me.

The COURT.—Make it "A-1."

Mr. WINDERS.—I am willing to claim ownership.

(Testimony of Higinio Fernandes.)

(Whereupon map was admitted in evidence as Defendant's Exhibit 'A–1.")

Mr. GRAHAM.—I will mark that point "B."

(Point "B" marked on Exhibit "A–1.")

Q. On Defendant's Exhibit "A–1" point "B" is George's cabin? A. Yes, sir.

Q. Just take the stand again, Mr. Fernandes. Now, how near was the nearest inhabitant other than you and the two [57—11] railway men? How near was the nearest rancher or farmer?

A. I don't know. About a mile and a half or two miles. There is not much farming around there.

Q. Anybody in the station? Anybody living there or staying there? A. No.

Q. Is there any resident of the station at Badger outside of you three?

A. Well, there was another railway man, but he was not there.

Q. He was not there on that day? A. No, sir.

Q. What was in the warehouse on the day?

A. What?

Q. What was in the warehouse on that day?

A. There was some grain and wool and that is all I know about.

Q. How much grain?

A. There were about fifty or sixty sacks.

Q. And how much wool?

A. I don't know for sure, but about two hundred sacks, I think. Something like that. I ain't sure.

Q. Was the warehouse kept locked at all times?

A. Most of the time locked, yes.

(Testimony of Higinio Fernandes.)

Q. Most of the time. You mean, when nobody was in the warehouse was it locked at all times?

A. Yes, sir; supposed to be locked at all times, yes.

Q. What did you do after you finished dinner?

A. I don't know. We stayed around there and after we had [58—12] dinner we went to his shack—the section foreman's shack.

Q. Where did you have dinner—in your shack or his? A. Yes, in my shack.

Q. And then you went over to his shack?

A. Yes, sir.

Q. And did you go out that night before you went to bed to do anything in regard to lambs?

A. Well, I went to his shack and stayed there after we had supper or dinner or whatever you want to call it.

Q. And when did you go to bed?

A. I cannot tell for sure. It must have been half-past seven or eight o'clock. Between that time. I ain't sure.

Q. What was the next thing that happened?

A. Well, the next thing happened when he called me up.

Q. Who?

A. The section foreman.

Q. He woke you up, did he? A. Yes, sir.

Q. And what did you do?

A. I got up and I went out to see what was the matter.

(Testimony of Higinio Fernandes.)

Q. And what did you see? A. I saw the fire.

Q. Now, what time was that?

A. Well, that was—that must be about pretty close to 10:00 o'clock, I guess.

Q. 10:00 o'clock?

A. I ain't sure about that.

Q. And when you saw the fire where was it? [59—13] A. It was on the southwest side.

Q. The southwest side?

A. The southwest corner.

Q. Of what? A. Of the warehouse.

Q. Of the warehouse? A. Yes, sir.

Q. Was that the corner of the warehouse closest or furthest away from the railroad tracks?

A. It was the closest corner.

Q. And where was the fire headed—had it gained considerable headway? Was it a big fire at that time or how far had it gone?

A. It was quite a bit of fire.

Q. I beg your pardon.

A. There was quite a bit of fire.

Q. Had it reached the roof?

A. I don't think so. It was not at the roof yet.

Q. It was not at the roof yet? A. No, sir.

Q. How far up—or how far had it gone towards the roof?

A. Well, I don't know. About halfway up.

Q. About halfway up? A. Yes, sir.

Q. Where did it appear to have started from?

A. Well, it appears—it seems to me—

(Testimony of Higinio Fernandes.)

Mr. WINDERS.—(Interrupting.) I think the witness should state what he observed, your Honor.

The COURT.—Yes. State that.

A. I cannot say where it started, but it seemed to me that [60—14] it was started from the ground.

Mr. WINDERS.—What did he say?

Mr. GRAHAM.—I didn't get his answer. Are you objecting?

Mr. WINDERS.—Yes.

The COURT.—Just tell what you saw.

A. I just saw the fire.

The COURT.—How far it extended up and where it was.

A. All that side of the building was on fire. That is all I can remember.

Q. Well, from what direction? Was it burning from the roof down or from the ground up?

A. From the ground up.

Q. And what did you do?

A. Well, I went out and I didn't know what to do. The first thing he said was that he had better get his stuff out of the shack.

Q. Who said that? A. The section foreman.

Q. Did you try to put the fire out?

A. There was no use to try. There was too much fire to try to put the fire out.

Q. Did you have any fire devices there or was there anything with which you could put it out? Any water?

(Testimony of Higinio Fernandes.)

A. We didn't have any water there to do it with.

Q. Did you help him save his things out of the shack? A. Yes, sir.

Q. Did his shack burn down during the fire?

A. No.

Q. How long did the fire last? [61—15]

A. Oh, I don't know. All night, I guess.

Q. And you were there all the time?

A. Yes, we were there all the time.

Q. Was there anything saved out of the warehouse? A. Saved?

Q. Yes. A. No.

Q. "No" was your answer, was it?

A. Yes, sir.

Q. Was the warehouse completely destroyed?

A. Yes, sir.

Q. Now, what is the station that is closest to Badger on the west? A. What station?

Q. Yes. What station—what is the first station west of Badger of any size?

A. You mean station on the west?

Q. Yes.

A. You mean, don't you, on the north side?

Mr. WINDERS.—The directions are really north and south there, Mr. Graham. The railroad men call them northwest and southeast.

A. North side?

Q. Yes.

A. North and south it seems to be to me.

(Testimony of Higinio Fernandes.)

Q. What is the name of that station—where is Kiona?

A. Kiona is about seven miles from Badger.

Q. Northwest? A. North.

Q. North? [62—16] A. Yes, sir.

Q. And what is the condition of the ground—was it flat or upgrade or downgrade between Kiona and Badger? A. It is mostly upgrade.

Q. From Kiona to Badger upgrade did you say?

A. Upgrade.

Q. Is it a steep or stiff grade?

A. There is quite a bit of grade.

Q. When the trains go up that grade do they—do you notice any laboring or hard work getting up the grade—pulling the load?

A. Well, it generally pulls pretty hard.

Q. In what way do they work hard? What is the result of that? A. I don't understand.

Q. I beg your pardon?

The COURT.—What do you see about the engines when they go up this grade?

A. I see lots of smoke.

The COURT.—How is that?

A. I see lots of smoke.

The COURT.—And what do you hear?

A. I don't hear nothing just the puffing.

Q. Just the puffiing? A. Yes, sir.

Q. And what did you see besides smoke?

A. Well, I didn't see anything much until this

(Testimony of Higinio Fernandes.)

summer. I kind of watched this summer and I saw some sparks coming out of the engine.

Q. Sparks coming from where? [63—17]

A. From the chimney or whatever they call it, but I never paid attention before.

Mr. WINDERS.—Then I move to strike his previous answer.

The COURT.—I think I will let it stand. Denied.

Mr. WINDERS.—Exception.

Mr. GRAHAM.—I think that is all. You may cross-examine.

Cross-examination.

(By Mr. WINDERS.)

Q. Mr. Fernandes, you were in charge of Ben Agor's sheep camp around there? A. Yes, sir.

Q. So that the jury may not get the wrong impression, there never has been any depot, station, or telegraph operator in that station, has there?

A. Not since I have been there.

Q. There never was any agent there?

A. Well, about four or five years ago there was an agent there.

Q. Well, that is what somebody told you?

A. Well, I was there at that time.

Q. He was just a telegraph operator, wasn't he?

A. He was just a telegraph operator.

Q. That was all? A. Yes, sir.

Q. As a matter of fact, this place of Badger, the railroad company has a number of passing tracks, don't they? A. Yes, sir. [64—18]

(Testimony of Higinio Fernandes.)

Q. And the trains pass there. A. Yes, sir.

Q. And they store large numbers of freight-cars on those tracks, do they not, at Badger?

A. Yes, sir.

Q. Now, you were talking something about the grade from Kiona up to Badger. What do you know about the grade?

A. Well, I know that there is a grade going up the hill.

Q. Well, where does the grade run with reference to the Badger station? Is there still a grade when you get by what you call Badger?

A. I don't think so.

Q. Isn't it a fact that three-quarters of a mile before you get into Badger you are on a level grade and on a descending grade? Do you know that?

A. Well, I ain't sure.

Q. And it had been the habit of the railroad company to put on a helper engine on freight trains at Kiona and the helper engine would cut off at Badger, wouldn't it. That is, ordinarily. That they would take the second engine off at Badger, isn't that right? A. Sometimes.

Q. Well, they would do it right along, wouldn't they, except on the last trip at night?

A. I don't know anything about at night.

Q. But you do know that this second engine that they put on at Kiona, that engine would come with the freight train up as far as Badger and then they would cut the engine off?

(Testimony of Higinio Fernandes.)

Mr. GRAHAM.—I do not think that that is proper [65—19] cross-examination.

A. I don't know.

Mr. GRAHAM.—I didn't ask him anything about engines.

Mr. WINDERS.—You had him talking about grades. I didn't know why you wanted to call a sheep herder for grades, but you have done so.

Mr. GRAHAM.—I do not need to ask for your judgment about that.

The COURT.—He did not ask him about the engines or the make-up of the trains.

Mr. WINDERS.—Very well.

The COURT.—The objection will be sustained.

Q. Now, will you just come down here, please, Mr. Fernandes. Take this print here. The direction towards Pasco is generally a southerly direction. This is towards Pasco (indicating)? A. Yes, sir.

Q. South? A. South and southeast.

Q. Yes, south? A. Yes, sir.

Q. So that in accordance with the directions—from Seattle that is south and then towards Seattle and Kiona it is north, is it not? A. Yes, sir.

Q. Now, the warehouse that was burned is on the east side of the track? A. Yes, sir.

Q. And that is indicated here where it says "Former warehouse." Is that the location of the warehouse? [66—20]

A. That is the location of the warehouse.

Mr. WINDERS.—I will put a "W" there although it is already marked.

(Testimony of Higinio Fernandes.)

(Whereupon letter "W" is marked upon Exhibit "A-1.")

Q. Then to the north of this warehouse is where Art, the section foreman lived? A. Yes, sir.

Q. There was an old box-car set out there and he lived in there? A. Yes, sir.

Q. All right. And then to the south the company had an ice-house, did it not?

A. Yes, sir; an ice-house.

Q. And then a little farther to the south there was an old cistern where they used to keep water?

A. Yes, sir.

Q. And then your place was down farther south about one hundred and fifty yards or about four hundred and fifty or five hundred feet?

A. Yes, sir, just about.

Q. Just about? A. Yes, sir.

Q. Then across the track on the west side it is marked "Section Tool-House." A. Yes, sir.

Q. Is that where the tool-house would be located?

A. Yes, sir, just about.

Q. And this is their gasoline tank (indicating). That is about where it would be located. You remember that they have a little iron tank? [67—21]

A. Yes, sir.

Q. And then a house where George lived—you have marked that "B." That is where he lived?

A. Yes, sir.

Q. One of the sectionmen? A. Yes, sir.

Q. And then there is another house marked "D.

(Testimony of Higinio Fernandes.)

H. Wagner." That was another sectionman who lived there? A. Yes, sir.

Q. And here is another cistern on this side?

A. Yes, sir.

Q. And here is what you call the station?

A. Yes, that is what we call the station.

Q. And then back of the station there are some old improvements—some rancher used to live in there? A. Yes, sir.

The COURT.—How far?

A. About half a mile. I ain't sure about that.

Q. As a matter of fact, those old buildings where the postoffice used to be were within three hundred feet, weren't they? A. The postoffice?

Q. Well, there used to be an old shed there.

A. There used to be an old school there.

Q. And that is only about three hundred or four hundred feet from the track, is it not?

A. Yes. I ain't sure.

Q. Now, on both sides of the tracks—on both the east side and the west side there are hills.

A. Yes, sir. [68—22]

Q. It is hilly around there, isn't it?

A. Yes, sir.

Q. And gradually that country has been turned over to grazing and raising of sheep.

A. Yes, sir.

Q. It used to be that they would raise wheat in there, isn't that right? A. Yes.

Q. And that warehouse was originally built as a wheat warehouse? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. And gradually the sheepmen have taken up the whole country? A. Well, not the whole country.

Q. Well, they have taken up a good deal of it, haven't they? A. Taken what?

Q. I mean, they are using it.

A. Well, some of the farmers are using it too. Some of the farmers are.

Q. Well, there aren't very many farmers there, isn't that right? A. Well, they haul wheat there.

Q. Where do they haul wheat?

A. Up in the Horse Heaven country.

Q. I am talking in the immediate vicinity of the station there. A. I don't know about that.

Q. Farther to the south and towards Pasco you have a kind of a corral down there where you shear your sheep, haven't you? A. Yes, sir. [69—23]

Q. That is about where—in line with where your house would be, but probably about a thousand feet south? A. Yes, sir.

Mr. WINDERS.—Just take the stand again.

Q. Now, these sheep of Mr. Agor—there are other sheepmen in that country, are there not?

A. Yes, sir.

Q. As a matter of fact, on this Sunday you were having trouble with another sheepman, weren't you?

A. Yes, we were having trouble.

Q. You had asked the section foreman and his helper to go up with you in the hills to drive another man's sheep off of your range? A. Yes, sir.

Q. And when you got up there you found a boy by the name of Christianson up there?

(Testimony of Higinio Fernandes.)

A. Yes, sir.

Q. And you told Christianson that he had better keep off your range? A. Yes, sir.

Mr. GRAHAM.—I object to that. That is immaterial.

Mr. WINDERS.—I don't know that it is immaterial. You asked him what he did that afternoon.

The COURT.—He has already answered. Proceed.

Q. And you told Christianson that he had better tell his father that if he didn't keep off of there you would get him?

Mr. GRAHAM—I object to that.

The COURT.—Sustained.

Q. There was considerable animosity and difficulty between [70—24] you sheep fellows that were using these ranges around Pasco, wasn't there?

A. Yes, sir.

Mr. GRAHAM.—I object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—Sustained.

Q. And as a matter of fact, Mr. Fernandes, either you or a ranger that you would have would go out over your range every day to see if any one was putting horses on it or sheep, and if they did to drive them off? A. Yes, sir.

Q. And you had some people around there that did not like you any too well.

Mr. GRAHAM.—I object to that as incompetent, irrelevant and immaterial.

(Testimony of Higinio Fernandes.)

The COURT.—Sustained.

Q. You and Art the section foreman and George after you had been up clearing your range of these sheep came down about 4:00 o'clock or 4:30?

A. I ain't sure about that. Just about.

Q. And you took the section foreman over to your place to dinner? A. Yes, sir.

Q. You cooked dinner? A. Yes, sir.

Q. What kind of a stove do you have?

A. What kind?

Q. I beg your pardon?

A. I don't know what kind it was. [71—25]

Q. Well, what did you burn? A. What?

Q. What did you burn? A. Wood.

Q. Wood? A. Yes, sir.

Q. How much—you called it a shack,—yo won't take offense if I call it a shack, too? How large was the place where you lived, Mr. Fernandes?

A. My shack?

Q. Yes. How large was your place?

A. Just a little shack—a small shack.

The COURT.—Ten by twelve or forty by fifty, which was it?

Q. Just one room, isn't it?

A. Just one-room shack.

Q. One room? A. Yes, sir.

Q. And then after you and the section foreman had had your dinner you went from your house, which is down to the south of the ice-house and the cistern five hundred feet—how did you get up to the

(Testimony of Higinio Fernandes.)

section foreman's house? Did you go in front or did you go back of the warehouse?

A. I do not remember which way we went

Q. There was a road back of the warehouse, was there? A. Yes, sir.

Q. Which runs right alongside of the warehouse?

A. Yes, sir.

Q. You don't know which way you went?

A. No, sir. [72—26]

Q. But, anyhow, you got down there somehow?

A. Yes, sir.

Q. And you stayed down here at the section foreman's house until about 7:30 or so?

A. Something like that. I ain't sure.

Q. And then you went back to your place?

A. Yes, sir.

Q. Do you remember how you went back? Whether you went along the track?

A. Yes, I remember the way I went back.

Q. You went along the track?

A. No, I went on this side of the track.

Q. I beg your pardon.

A. I went on this side of the warehouse.

Q. You went along this road?

A. Yes, sir, between that road and the warehouse.

Mr. GRAHAM.—I didn't hear that.

Q. You went between that road and the warehouse?

A. Yes, sir. On this side of the warehouse I went.

Q. And then as I understand it you went to sleep?

(Testimony of Higinio Fernandes.)

A. Yes, sir.

Q. And about 10:00 o'clock the section foreman awakened you? A. Yes, sir.

Q. I wish you would just come down, Mr. Fernandes, and mark on this print where the fire was in this warehouse when you got there after the foreman had called you. Take your time. This is north and this is south, and here is the ice-house, and this is the warehouse, and here is Art's place and your place is down in here somewhere (indicating)? [73—27] A. You mean where the fire was?

Q. Well, where was the fire when you got there?

A. Well, the fire was on this side (indicating).

Q. You mean that it was on the south end?

A. It was on the south end. On the west side—on the southwest side.

Q. Well, was there any fire—now, south is towards Pasco, isn't it? A. Yes, sir.

Q. And the railroad track is to the west of the warehouse?

A. The railroad track is to the west of the warehouse.

Q. Was there any fire on the west side of the warehouse when you got there?

A. I don't know. I don't remember.

Q. The fact of the matter is that the fire was all in this south end, wasn't it? A. Yes, sir.

Q. And the fire was burning up from the floor?

A. From the bottom. I don't know whether it was on the floor.

(Testimony of Higinio Fernandes.)

Q. Well, there was no fire on the ground at that time, was there? A. Well, I don't know.

Q. Just take the chair. This warehouse is built up on piles five or six feet, isn't it? A. Yes, sir.

Q. So that the door of the warehouse would be about level with the door of a car? A. Yes, sir.

Q. So that this warehouse would be setting up here aways? [74—28] A. Yes.

Q. And this we will say is your floor level. Now, what I am asking you is when you got out there and saw this fire on this south side— A. Yes.

Q. (Continuing.) —was there any fire in those piles on the ground?

A. I ain't sure of that. I know there was quite a bit most all over there.

Q. I beg your pardon?

A. There was fire most all over. There was fire on the side, I remember.

Q. Yes, there was fire on the side, but what I am asking you, had the fire at that time reached the ground or was there any fire on the ground?

A. I don't know.

Q. Isn't it a fact, Mr. Fernandes, that when you got there—here is the east end of the warehouse and your tracks over here (indicating)—the fire had broken out through the south end of this warehouse from the floor and it was going up probably fifteen or twenty feet and had burned down about two feet on the piles but had not reached the ground at that time? A. I don't know.

Q. You don't know?

(Testimony of Higinio Fernandes.)

A. I don't know for sure.

Q. You said that it was dry and it had not been raining any? A. Yes. It was kind of dry.

Q. It is a pretty dry country around there, isn't it, Mr. Fernandes? [75—29]

A. It is dry, yes, sir.

Q. Pretty much sand and sagebrush, isn't it?

A. In some parts—in some places.

Q. I beg your pardon?

A. In some places it is sand.

Q. Well, take around your place there. Is there anything that has any life to it—any greenness at all excepting sagebrush?

A. Well, nothing but sagebrush around in there. Of course, sometimes when the wind blows there are some weeds there.

Q. I cannot hear you.

A. Not so much around that place where we are in.

Mr. GRAHAM.—How is that?

The COURT.—There is nothing else except sand and sagebrush around the place where he lives, as I understand his testimony.

A. This is a kind of open place.

Q. There is not anything around what we call that station of Badger excepting sagebrush, is there?

A. Sometimes some weeds.

Q. Sometimes some weeds? A. Yes, sir.

Q. Where? A. All over that country.

Q. Where? A. Most all over.

Q. Most all over? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Now, are there any weeds? You have got fenced in two [76—30] or three acres back of your house, haven't you? A. Mr. Agor has.

Q. Mr. Agor has? A. Yes, sir.

Q. Are there any weeds there?

A. None inside of the fence.

Q. What?

A None inside of the fence. There are no weeds in there.

Q. Are there any weeds between your fence and the railroad track?

A. Well, I don't know. I never paid much attention.

Q. Did you ever see any weeds there?

A. I see some weeds there once in a while; yes, sir.

Q. Now, do you have any shelter for your sheep there? A. No, no shelter no.

Q. You would bring your sheep—your sheep were up in the hills at this time—in May, were they not?

A. The sheep were all out already.

Q. The sheep were already out?

A. Yes, sir, the sheep were already out.

Q. The sheep were all up in the hills, weren't they? A. In the mountains, yes, sir.

Q. You didn't have any lambs around there, did you? A. Not much.

Q. You would bring the sheep down in the fall and you would herd them there, wouldn't you, in the winter? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. You did not purport to have any shed or any shelter or anything of that kind?

A. No. [77—31]

Q. And you fed them, of course, some, didn't you? A. Yes, sir.

Mr. GRAHAM.—I think this is entirely immaterial, how they take care of their sheep.

The COURT.—There is nothing unanswered.

Q. Now, you do have some rain over there in March or April, don't you? A. Some lambs?

Q. I say you have some rain in March and April, don't you? A. Sometimes, yes, sir.

Q. As a matter of fact you had a storm over there when you were shearing so that you had to stop shearing, didn't you? A. Yes, sir.

Q. Now, this so-called station of Badger, that is on the main line of the Northern Pacific?

A. Yes, sir.

Q. Some thirteen or fourteen miles, so that the jury can get it located, this side of Kennewick?

A. Yes, sir.

Q. And not very far from Pasco? A. No.

Q. You say you had not seen anyone around the station that day? A. No, I had not.

Q. Had your ranger—the man that goes out on horseback to see that no one is on your range—

A. Yes, sir.

Q. (Continuing.) —had he been around there that day? A. Anybody you mean? [78—32]

Q. The man that rides the horse?

(Testimony of Higinio Fernandes.)

A. Well, I don't know. I don't see nobody that day.

Q. You hadn't seen him? A. No.

Q. Where do the herders come? Where do they get their food and their supplies?

A. The herders?

Q. Yes.

A. There were no herders around in there.

Q. There were no herders around in there?

A. No, sir.

Q. I didn't ask you that. I asked you where they got their supplies? A. Well, wherever they can.

Q. Well, you keep some of that in this warehouse, don't you—didn't you? A. Keep what?

Q. You kept some of their supplies in this warehouse, or did you keep them in the shack?

A. We kept it in the shack.

Q. The shack was about ten by twelve feet, wasn't it?

A. Well, there are two or three shacks around there.

Q. How many?

A. There are two or three shacks around there.

Q. How large are the other shacks?

A. About the same size, more or less.

Q. How large are the other shacks?

Mr. GRAHAM.—He has answered.

A. I ain't sure. I don't know.

Q. I beg your pardon, I didn't hear you. About the same [79—33] size? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Now, you had charge of this warehouse, didn't you? A. No, I didn't have charge of it.

Q. You didn't have charge of it? A. No, sir.

Q. Well, who had the key to it?

A. Well, the key was generally left in the door—on the side of the door at the bottom.

Q. You would leave the key lying there at the door? A. Yes, sir.

Q. And you had your 1925 crop of wool in the warehouse? A. It was there, yes, sir.

Q. And you had the 1926 crop? A. Yes, sir.

Q. And you had some oats in there?

A. Yes, sir.

Q. I noticed the other day over there where you built a new little warehouse and shed?

A. Yes, sir.

Q. I noticed corn and oats coming out of the side. What causes that?

Mr. GRAHAM.—I object to that. That is improper cross-examination and it is immaterial.

The COURT.—Sustained.

Mr. GRAHAM.—This is a new warehouse.

Q. Well, how about rats over there? Have you got a lot of them?

A. I guess there are quite a number of them.

Q. I beg your pardon? [80—34]

A. I guess there are rats.

Q. Well, you know there are lots of rats over there, don't you? A. Yes, sir.

Q. You know there are so many rats in that cave

(Testimony of Higinio Fernandes.)

over there now that you are almost afraid to go in there, isn't that a fact?

A. Yes, sir; there are rats there.

Q. And you know that they were through this warehouse that burned down and you know they are in your present warehouse. A. Yes, sir.

Q. In this warehouse did you have anything else in there besides this wool and these oats?

A. Not that I know of.

Q. Didn't you have your sheep shearing machinery and one thing or another of that kind in there?

A. There was some old shearing machinery around there, but I never paid much attention to it.

Q. Well, there was some machinery around there, wasn't there? A. Yes, sir, there was.

Q. As a matter of fact, the sheep shearers had been there—some of them had slept in that warehouse, hadn't they? A. Yes, sir.

Q. And some of their old clothes were in there.

(Witness does not answer.)

Q. As a matter of fact, if this fire were to occur now—if this jury were to go over there now it would find in the debris under this warehouse teakettles and cooking utensils, wouldn't it? [81—35]

A. Yes, sir.

Q. And cans of all kinds that had been in that warehouse that burned? A. Yes, sir.

Q. You did not mean to say, when you were talking to Mr. Graham about this southwest corner—the fire in this south end—one corner of this warehouse was not any closer than another, was it? I

(Testimony of Higinio Fernandes.)

mean, the warehouse was the same distance from the track its entire length, wasn't it?

A. Well, the southwest corner is closer than the east corner.

Q. Yes. It is closer than the back of it?

A. Yes, sir.

Q. But I mean as far as the front of the warehouse is concerned, it is the same distance or it was the same distance from the track all along the front, wasn't it? A. Yes, sir.

Q. Everything that was in this warehouse belonged to Mr. Agor, didn't it? A. Yes, sir.

Q. He owned the oats and he owned the wool?

A. Yes, sir.

Q. This whole warehouse was all in a bunch of flames pretty quick after you got there, wasn't it?

A. Yes, sir.

Q. And it was the wool and everything else that was burned up by the morning? A. Yes, it was.

Mr. WINDERS.—That is all. [82—36]

Redirect Examination.

(By Mr. GRAHAM.)

Q. Where were you standing when you first saw the fire? A. Where I was standing?

Q. Yes. Were you standing south of the warehouse or—

The COURT.—(Interrupting.) Just step down and point out where you were standing.

Q. Point out on the map?

A. I was outside of the door from the shack.

(Testimony of Higinio Fernandes.)

Q. From your shack? A. Yes, sir.

Q. What direction would that be from the warehouse?

A. It would be south—on the west side of the shack.

Q. It was on the west side of the shack?

A. Yes, sir.

Q. But what direction from the warehouse?

A. Well, south.

The COURT.—Have you not got it on the map there? I think the jury knows.

Q. South of the warehouse? A. Yes, sir.

Q. Now, from where you were standing could you see whether the fire was actually burning on the west side of the warehouse?

A. Well, I could not see it; no.

Q. And where was the fire when you saw it? More towards the west of the south side or more towards the east of the south side?

A. More towards the south—towards the south side, it seemed to me. [83—37]

Q. I will ask the question again.

A. On the south side more.

Q. Well, was it all along the south side or was it part of the south side?

A. Well, I cannot see on the south side from the shack, you see. I could not see it.

Q. Well, the whole south end was burning or part of the south end was burning?

A. Well, part of it. I ain't sure.

(Testimony of Higinio Fernandes.)

Q. Which part—closest to the west or closest to the east? A. On the south side.

Q. Just step down, Mr. Fernandes. Stand right over here. Now, here is the south end of the warehouse (indicating). A. Yes, sir.

Q. And you were standing over south of the warehouse near your shack when you first saw the fire?

A. Yes, sir.

Q. Now, looking over there you say part of the south end was burning. That is, it was not burning all along the south end but part of it. Now, which part? Was it the part closest to the railroad track or was it the part furthest away from the railroad track?

A. Just about here. I guess (indicating on map).

Q. About there (indicating)?

A. Yes, sir.

Q. That would be what part of the south end?

A. That would be about the west side, isn't it—more on the west side.

Mr. WINDERS.—Better mark it.

Mr. GRAHAM.—Take your seat. [84—38]

Q. You said there were weeds around here in this country. Were they any Russian thistles?

A. Sometimes I see some blown around there. Of course I never paid attention.

Q. But there are Russian thistles that blow around that country? A. Yes, sir.

Q. That is, when the wind is blowing?

A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Now the key, you say, was kept near the door. Was it kept out in the open where anybody could get it, or did you put it in a hiding place?

A. No. Most anybody could get it.

Q. Was it hung on a hook, or was it put in a hole?

A. It was put in a hole.

Q. It was put in a hole?

A. Yes, sir. Just a hole in the floor right by the door.

Q. It is a hole where the cats got through?

A. Yes, sir.

Q. And you stuck the key in that hole?

A. Yes, sir.

Q. If anybody reached in the hole there they could find the key? A. Yes, sir.

Q. And that is why you say that anybody could get it? A. Yes, sir.

Q. You say that there are cooking utensils in the debris of that warehouse. Have you searched through that debris so that you know there are cooking utensils in there?

A. How do you mean? [85—39]

Q. Well, Mr. Winders said that right now there were cooking utensils and dishes in the ashes of the old warehouse. Have you examined the ashes yourself so that you know that to be the fact?

A. I never examined it, no.

Q. Have you ever seen any cooking utensils in the debris—in those ashes?

A. Well, you see it most all over that country.

Q. You see it most all over that country?

(Testimony of Higinio Fernandes.)

A. Yes, sir.

Q. You mean there is trash thrown out?

A. Yes, in most any place. There used to be a lot of homesteaders around there and there was a lot of dishes thrown around there.

Q. I just want to make sure that you understand the question. Have you seen in the ashes of that warehouse any cooking utensils or dishes?

A. No, I never paid attention.

Q. You said that the sheep herders sometimes slept in this warehouse. Had anybody slept in the warehouse on the day previous or on the day of this fire or the night previous?

A. They slept—oh, I don't know—about ten days I guess before. The sheep herder slept there.

Q. About ten days before the fire the sheep herder slept there?

A. Yes. I don't know how many days before, but the sheep herders had slept there.

Q. About ten days before?

A. Yes, sir. When they were shearing there.

Q. Had the shearing been finished before the fire?

[86—40] A. Yes, sir.

Q. How long?

A. Oh, I cannot say how many days.

Q. Had there been anybody sleeping in that warehouse after that shearing was over?

A. Not that I know of.

Q. Well, you would know. You were around there all the time?

A. I haven't seen anybody.

(Testimony of Higinio Fernandes.)

Q. And on that day you saw nobody around the station except the two railroad employees?

A. No.

Mr. GRAHAM.—That is all.

Recross-examination.

(By Mr. WINDERS.)

Q. Now Mr. Fernandes, I happened to be over to Badger the other day myself. Do you tell this jury—you have been over the ashes—you looked through the ashes that were from the fire, haven't you? A. No, I have not.

Q. You go by there every day, don't you?

A. Well, yes.

Q. Have you seen burned teakettles in those ashes—burned?

A. Well, I have seen a lot of stuff there. Lots of—

Q. Haven't you seen burnt pans? Pans that were burnt?

A. I didn't pay any attention to stuff like that.

Q. And you have been over there every day?

A. I have, yes, sir.

Q. Now, what did you see—what do you see in those ashes? What is over there now in those ashes? [87—41]

A. Well, I did not investigate. That ain't my business.

Q. You never investigated? A. No.

Q. Now, you say there was a hole for the cat to go in? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Unfortunately I had not seen the warehouse before it burned.

Mr. GRAHAM.—If the Court please, counsel is making some testimony in the record. He has not been sworn as a witness. I object to his remark.

Mr. WINDERS.—I was just asking him where that hole was.

Q. Where was this hole? On the east side?

A. On the north side.

Q. On the north side of what? A. Of the door.

Q. And you would slip this key right in that hole?

A. Yes, sir.

Q. If you looked in that hole you could see it, I suppose?

A. Well, I guess if somebody wanted it, they could get it.

Q. It was not unusual to see men who were riding without tickets around the station there—hoboes, in other words? A. What do you mean?

Q. I say, it was not an unusual thing to see hoboes around this place, was it?

A. No. You would see hoboes once in awhile.

Q. As a matter of fact, at times they have cut off trains there and stored the cars on the passing tracks, haven't they, probably as high as one hundred and fifty freight cars, haven't they? [88—42]

A. Yes, sir.

Mr. WINDERS.—That is all.

Mr. GRAHAM.—May I ask one question on redirect?

The COURT.—Yes.

(Testimony of Higinio Fernandes.)

Mr. GRAHAM. — Were there any freight-cars along the tracks on the day of the fire?

A. I do not remember.

Mr. GRAHAM.—You do not remember?

A. No, sir.

Mr. GRAHAM.—That is all.

(Witness excused.)

TESTIMONY OF HUGH PALMER, FOR PLAINTIFF.

HUGH PALMER, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your full name. A. Hugh Palmer.

Q. By whom are you employed?

A. The Northern Pacific Railway Company.

Q. You are a fireman, aren't you?

A. Yes, sir.

Q. And on May 2d you were a fireman on what number engine? A. 1618.

Mr. WINDERS.—Talk to the jury, Mr. Palmer; they want to hear you.

Q. That was the helper engine that went through? [89—43] A. Yes, sir.

Q. What time did your train go through Badger going towards Pasco?

A. Going through Badger going to Pasco?

Q. Yes.

(Testimony of Hugh Palmer.)

A. Right around 9:45 or 9:50.

Q. About 9:50? A. Yes, sir.

Q. There was a double-header. In other words, you had two engines on? A. Yes, sir.

Q. And they were hauling a long load of freight-cars? A. Yes, sir.

Q. About how many freight-cars?

A. Well, I think there were about seventy.

Q. About seventy freight-cars? A. Yes, sir.

Q. And did you see any fire at Badger when you went through? A. No, sir.

Q. And then when you got through—got over—let me see. You got to Vista, didn't you?

A. Yes, sir.

Q. That is the next station beyond Badger on the way to Pasco? A. The second station.

Q. The second station? A. Yes, sir.

Q. Before you got to Vista did you look back and see an illumination on the sky? A. No, sir. [90—44]

Q. But when you got to Vista you did?

A. Yes, sir.

Q. And you said to the engineer, "It looks like the whole town of Badger is afire," did you not?

A. Yes, sir.

Q. And how much of a run is it from Badger to Vista?

A. Well, it is about fifteen or twenty minutes, something like that.

Mr. GRAHAM.—That is all.

(Testimony of Hugh Palmer.)

Cross-examination.

(By Mr. WINDERS.)

Q. Now, Mr. Palmer, you had been on this engine 1618 for a long time, hadn't you?

A. Yes, sir.

Q. How long have you been in the railroad service? A. About eighteen years and a half.

Q. How long have you been on the Pasco Division? A. All of that time.

Q. The Pasco Division starts at Ellensburg and goes to Pasco?

A. At Ellensburg and goes through Pasco to Spokane.

Q. And you had been working on this helper engine 1618 for some time? A. Yes, sir.

Q. And you were working on this day in the regular course of your employment? A. Yes, sir.

Q. And where did you hook on to the helper engine? A. At Kiona. [91—45]

Q. That would be west, railroad man's direction, but north really—the real direction from Badger?

A. Yes, sir.

Q. Is there a grade between Kiona and Badger?

A. Yes, sir.

Mr. GRAHAM.—We object to that as irrelevant and immaterial and incompetent.

Mr. WINDERS.—You asked him about this helper engine.

Mr. GRAHAM.—That is not proper cross-examination.

(Testimony of Hugh Palmer.)

The COURT.—It is perhaps not proper cross-examination.

Mr. WINDERS.—I see.

Q. You had about seventy cars?

A. About seventy cars.

Q. You are familiar with the tonnage you had?

A. No, I don't remember—I don't remember—I don't know what tonnage we did have.

Q. Did you have an overload? A. No, sir.

Mr. GRAHAM.—I object to that.

Mr. WINDERS.—You asked him about the tonnage.

Mr. GRAHAM.—I did not ask him about the tonnage. I asked him how many freight-cars he had.

The COURT.—He has a right to find out whether they were loaded or empty on cross-examination.

Mr. GRAHAM.—Very well.

Q. You had an easy load, did you, Mr. Palmer?

A. Well, we were light that day.

Q. You were light? [92—46] A. Yes, sir.

Q. And then you went up to Vista?

A. Yes, sir.

Q. And got to Vista in fifteen or twenty minutes?

A. Yes, sir.

Q. You had to head into Vista to let No. 1, the North Coast passenger train, go by? A. Yes, sir.

Q. And you looked back and saw the illumination? A. Yes, sir.

Q. Was there anything in connection with your operation through Badger or the operation of this

(Testimony of Hugh Palmer.)

train or the operation of this engine or the other engine in your opinion that could have had anything to do with this fire?

A. Nothing whatever.

Q. Operating it in the same way as you had been operating it? A. Yes, sir.

Q. A capable engineer? A. Yes, sir.

Q. You had been on the run for a long while?

A. Yes, sir.

Mr. WINDERS.—That is all.

Mr. GRAHAM.—That is all.

(Witness excused.) [93—47]

TESTIMONY OF BEN AGOR, FOR PLAINTIFF.

BEN AGOR, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your full name, please.

A. Ben Agor.

Q. Where do you live? A. Yakima.

Q. What is your occupation?

A. Raising of sheep.

Q. You are a son of Peter Agor, aren't you?

A. I am.

Q. You—and who owned the wool that was destroyed in the warehouse at Badger on May 2d, 1926? A. Peter Agor.

(Testimony of Ben Agor.)

Q. You have the active management and control of the sheep business for your father, haven't you?

A. Yes, sir.

Q. How long have you been in the sheep business? A. All my life.

Q. Where was your 1925 and 1926 clip of wool kept? A. In the warehouse at Badger.

Q. You have two sheep ranges, haven't you?

A. Two sheep ranges.

Q. Where are they

A. One is in Benton County and one is in Kittitas County.

Q. And the two years' clip was in the warehouse at Badger at the time of the fire?

A. Yes, sir. [94—48]

Q. Under what arrangement was this wool kept in the warehouse there?

A. Just what was that?

Q. Under what arrangement was the wool stored in the warehouse?

A. I don't understand that question.

Mr. WINDERS.—I think he means did you have a lease or where did you get your right to put it there.

Q. Where did you get your right to put it there?

A. We got the right from Saddler Bros. at Kiona to use the warehouse for storage.

Q. And did you pay them storage for the use of this warehouse for wool? A. Yes, sir.

Q. Just describe this warehouse, Mr. Agor. You

(Testimony of Ben Agor.)

have been in Badger many times and you are familiar with the warehouse, aren't you?

A. Yes, sir.

Q. About what size was it, approximately?

A. Possibly fifty feet wide and two hundred feet long.

Q. That is approximately?

A. Approximately. I never measured it.

Q. And how was it situated in relation to the railroad track?

A. Well, I imagine it was about forty or fifty feet east of the main line.

The COURT.—You have that accurately, I presume, on the map.

Mr. GRAHAM.—Well, that was approximate also.

The COURT.—There is no use taking time for that. [95—49]

Mr. GRAHAM.—Very well, if the Court please.

Q. Was it kept locked at all times?

A. As far as I know.

Q. In that locality are there accumulations of dry weeds and other combustible material blowing around during a dry wind?

A. I have seen tumbleweeds and I have seen some papers around about the warehouse.

Q. Is the warehouse on the ground or off of the ground?

A. I imagine it is about three or four feet off of the ground.

(Testimony of Ben Agor.)

Q. And is the opening—below the floor of the warehouse is it open or is it boarded up?

A. It is open.

Q. It is open? A. Yes, sir.

Q. Is there a grade between Kiona and Badger?

A. Yes, sir.

Q. In what way do the engines act pulling up this grade, have you observed—how do they behave with reference to laboring?

A. They labor very hard at times with a heavy load.

Q. And what is done by the railroad company at times to avoid this extra laboring on the grade —on the up grade?

A. I have noticed that sometimes they split the train.

Q. Yes.

A. Leave it halfway—about halfway between Kiona and Badger.

Q. Now, what kind of a roof has this warehouse —had this warehouse? [96—50]

A. A shingle roof, if I remember right.

Q. Was it a flat or a steep—a sloping roof?

A. A sloping roof.

Q. Was it a steep slope

A. Well, about an average slope that you see on a house.

Q. About an average slope? A. Yes.

Q. When did you see the scene of the fire?

A. What is that?

(Testimony of Ben Agor.)

Q. After the fire started when did you first see it?

A. I saw it on Monday morning about 10:00 or 10:30.

Q. You were in Yakima at the time that the fire started? A. Yes, sir.

Q. Was it still burning at that time when you saw it? A. Still smoldering.

A. How much wool was in the warehouse at the time of the fire? A. 70,000 pounds.

Q. Are you familiar with the market price of your wool? Does the nature of your business require you to keep posted on the market price of wool? A. It does.

Q. Was that the time of the year when sales of wool take place? A. It was.

Q. Do you know the market price of wool in your vicinity—in that vicinity, on or about May 2d, 1926? A. I think I do.

Q. What grade or quality was this wool that was stored in the warehouse? [97—51]

A. Well, the grade was a medium type of wool.

Q. When was it sheared?

A. It was shorn some time between the 15th and the 20th of March, if I remember right.

Q. Of both years?

A. Of both years, yes, sir.

Q. And how was it with reference to dirt content?

A. Well, it was cleaner than the average wool

(Testimony of Ben Agor.)

shorn in that country on account of being shorn earlier.

Q. And what was the market price of this wool at the time of the fire?

A. Well, wool had been selling from twenty-eight to thirty-two cents a pound that particular year and we figured a value on that wool of thirty cents.

Q. Do you think that you could have sold the wool had the fire not occurred for that amount at that time? A. Yes, sir, we could have.

Q. Do you know of other sales that took place about that time of wool in that vicinity?

A. Right at that time I cannot say as to sales in that vicinity, as this wool was shorn about twenty days sooner than the other wool was shorn.

Q. Was the market stable or fluctuating during all that time?

A. No, the market was steady.

Q. And how soon do you know of another sale in that vicinity? How close to May 2d were there any other sales, if you know, of any other dealer?

A. Well, there was a sale in Yakima—wool that we financed of other concerns. We sold their wool for either thirty-one [98—52] and a half or thirty-two cents a pound.

Q. When was that? A. Around May 1st.

Q. Around May 1st? A. Yes, sir.

Q. And what was the grade of that wool with reference to this? A. About the same grade.

Q. Yes.

(Testimony of Ben Agor.)

A. Possibly a little lighter in shrinkage but very little difference; the dirt content was about the same.

Q. Did you sell your Kittitas wool about that time? A. A little after.

Mr. WINDERS.—It seems to me that he is unnecessarily encumbering the record. He has testified—the witness—what in his opinion the market value was. Now I might want to cross-examine him and I submit that the questions that he is asking now are cross-examination of his own witness.

Mr. GRAHAM.—Will you admit that the market value was thirty cents a pound?

Mr. WINDERS.—I do not admit that it was thirty cents. I am not going to offer any evidence. I think Mr. Agor is a perfectly honorable man and I am not going to offer any evidence against him on that price. But I am not admitting that it was thirty cents.

Q. Was the wool insured against fire?

A. It was.

Q. With whom?

A. With the General Insurance Company. [99—53]

Q. With the General Insurance Company of America? A. Of America, yes, sir.

Q. Did the General Insurance Company of America pay to you the market value of this wool?

A. It did.

(Testimony of Ben Agor.)

Mr. WINDERS.—I object, if your Honor please, however I have no objection to him stating how much they paid. I do not think there is any dispute about it.

The COURT.—State the amount.

A. Offhand I cannot say.

Q. Well, handing you Plaintiff's Exhibit for identification—

The COURT.—(Interrupting.) Hand him the check.

Mr. GRAHAM.—I beg your pardon?

The COURT.—Hand him the check and let him refresh his memory.

Q. I show you Plaintiff's Identification No. 1. State the amount after refreshing your recollection from the check. A. $20,481.90.

Q. Was that the amount?

A. That was the amount.

Q. Are you familiar with your father's signature? A. I am.

Q. Is that his indorsement on the back of that check? A. It looks like it.

Q. You know for a fact that that money was received? A. Yes, sir.

Q. Handing you Plaintiff's Exhibits 2 and 3 for identification, examine those. Are those your father's signature on the bottom of those papers?

A. They are. [100—54]

Mr. GRAHAM.—I offer these three exhibits in evidence, if the Court please.

Mr. WINDERS.—No objection.

(Testimony of Ben Agor.)

The COURT.—They may go in.

(Whereupon documents marked for identification Plaintiff's Exhibits 1, 2, and 3 were admitted in evidence as Plaintiff's Exhibits 1, 2, and 3, respectively.)

Mr. GRAHAM.—That is all.

Cross-examination.

(By Mr. WINDERS.)

Q. Mr. Agor, you have been familiar with this country for a good many years? A. I have.

Q. You and your father? A. Yes, sir.

Q. Have been quite extensively engaged in the sheep business? A. Yes, sir.

Q. And still are? A. Yes, sir.

Q. And intend to be? A. Yes, sir.

Q. Did you intend to leave any impression with this jury that there was any blowing of weeds or thistles around this warehouse or under this warehouse at the time of this fire?

A. Well, what I have noticed during a hard wind there—I have noticed thistles blowing across the right of way at times. [101—55]

Q. You are not testifying that there were any thistles blowing at the time of the fire, are you?

A. Well, I was not there at the time of the fire; no.

Q. As a matter of fact, they have some pretty severe winds around there, don't they?

A. They do.

Q. And the ground is practically sand and sagebrush right around the station?

(Testimony of Ben Agor.)

A. And bunch grass.

Q. And bunch grass. A. Yes, sir.

Q. You got over there the next morning after the fire? A. I did; yes, sir.

Q. And you talked to Fernandes, your foreman? A. At times; yes, sir.

Q. You don't know how this fire started, do you, Mr. Agor? A. No, I don't.

Q. Mr. Fernandes told you that he didn't know how it started? A. Yes, sir.

Q. You had in your warehouse, Mr. Agor, both your '25 and your '26 crops A. Yes, sir.

Q. And your best judgment is that there were 70,000 pounds? A. Which?

Q. And your best judgment is that there were 70,000 pounds of the two crops? A. Yes, sir.

Mr. WINDERS.—I think that is all.

Mr. GRAHAM.—That is all.

(Witness excused.) [102—56]

TESTIMONY OF R. W. DENT, FOR PLAINTIFF.

R. W. DENT, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. What is your name? A. R. W. Dent.

Q. Where do you live, Mr. Dent? A. Yakima.

Q. What is your business? A. Insurance.

(Testimony of R. W. Dent.)

Q. Are you the agent for the General Insurance Company of America in Yakima? A. Yes, sir.

Mr. GRAHAM.—Mark these for identification.

(Documents marked 4 and 5 for identification.)

Q. Did you visit the scene of this fire?

A. Yes.

Q. When, for the first time?

A. The next morning after the fire.

Q. About what time?

A. About 10:00 or 10:30.

Q. Was the fire still burning then?

A. Well, there were hot coals and ashes—yes.

Q. Well, it was still burning at that time, wasn't it? A. Oh, yes.

Q. It had not died down? A. No.

Q. And did you talk to the section foreman at that time? [103—57] A. Yes.

Q. What is his name?

A. I cannot call his name now. I cannot pronounce it.

Q. It is a Greek name? A. Yes, sir.

Q. Saligandus? A. That is it.

Q. And did he tell you when he first saw the fire?

Mr. WINDERS.—I object, if your Honor please, to that as hearsay. They have subpoenaed him. Saligandus is here. He was served with a subpoena from the Insurance Company.

Mr. GRAHAM.—We have not been able to talk to him. They would not allow us to ask him a question.

(Testimony of R. W. Dent.)

Mr. WINDERS.—Oh, no. You wanted to come down to our office and—

The COURT.—(Interrupting.) He can answer this question whether he talked to him.

Mr. GRAHAM.—I beg your pardon?

The COURT.—He can answer this question whether he talked to him. Whether he can tell what he said is another matter. Did he talk to you?

The WITNESS.—Yes, sir.

Q. And did he tell you how and when he first saw this fire? A. Yes, sir.

Q. Now, when did he tell you?

Mr. WINDERS.—I object to that, if your Honor please, trying to impeach somebody that they have not put on the witness-stand.

Mr. GRAHAM.—No, we are not trying to impeach anybody. [104—58] That is part of the *res gestae*—

Mr. WINDERS.—(Interrupting.) It is hearsay evidence and it is incompetent, irrelevant and immaterial.

Mr. GRAHAM.—The fire was still burning. It is part of the *res gestae.*

Mr. WINDERS.—You asked him how it started.

The COURT.—I will have to be shown. I do not think it is part of the *res gestae.* A statement made the next morning would not be *res gestae.*

Mr. GRAHAM.—The fire burned all night, if the Court please, and was still burning when he came on the scene.

(Testimony of R. W. Dent.)

The COURT.—Objection sustained.

Mr. GRAHAM.—Exception.

Q. Handing you Plaintiff's Exhibits 4 and 5 for identification, are those the copies of the policies of insurance that were issued to cover this wool?

A. Yes, sir.

Mr. GRAHAM.—I offer these in evidence.

Mr. WINDERS.—You do not expect me to read all these policies, do you?

Mr. GRAHAM.—No.

Mr. WINDERS.—I haven't any objection. They are the ordinary policies, are they?

The WITNESS.—The standard form except that we make our own form on the front covering the wool. The rest of the policy is the same.

Mr. WINDERS.—We have no objection.

The COURT.—They may be admitted.

(Whereupon policies of insurance were admitted in evidence as Plaintiff's Exhibits 4 and 5, respectively.) [105—59]

Mr. GRAHAM.—That is all.

Mr. WINDERS.—I have no questions.

(Witness excused.)

Mr. GRAHAM.—The plaintiff rests.

(Plaintiff rests.)

Mr. WINDERS.—At this time, if your Honor please, I want to interpose a motion for judgment of nonsuit. We have been here for a week in this case but I can see nothing that has been offered in evidence that calls for any answer on the part

of the railroad company. I understand that there are cases where a fire has started along the railroad right of way, where there was some evidence in connection with defective equipment or negligent operation, that would make a case, but I never apprehended nor do I now apprehend that there is any case in the books that holds that simply because the train goes by there about ten minutes before the fire and the fire breaks out in the warehouse ten minutes afterwards, that there is a case made of negligence against the railroad company.

The COURT.—I will excuse the jury until 2:00 o'clock.

(Jury was thereupon excused and argument was had by respective counsel on the motion.)

The COURT.—A good many years ago I tried a case in this court as one of the attorneys for the plaintiff to recover for the loss of a shingle-mill. We showed in that case [106—60] that the freight train that ran by this shingle-mill emitted sparks—large sparks. We also showed that surrounding this mill there was a great deal of inflammable material. Cedar—dry cedar. Within half an hour after the train—half an hour or such a matter, or possibly a little longer than that, the fire was discovered and the shingle-mill was destroyed. It was shown in the testimony that the mill was in operation at the time and employed some fifteen or twenty men, and a nonsuit was granted in that case by Judge Hanford. I always thought that he was wrong and I still think so, because I

think from what we showed in that case, the inflammable material surrounding and likewise the emitting of sparks from that same engine created a condition from which a reasonable inference could be drawn that the fire was occasioned by defective appliances.

While occupying the state court bench in Whatcom County about twenty-three or twenty-four years ago a case was presented of a logging engine setting fire to what was practically timber. In that case it was shown that along the railroad right of way and where the fire started there was inflammable material, and it was likewise shown in that case that the particular engine that was operated emitted sparks—large sparks. It was shown that upon this same engine fires had been started, and the testimony further showed—I thought it went further than was necessary—that there was a defect in the spark-arrester, and the meshes in the screen were likewise not of the latest approved pattern, and the court denied a nonsuit and denied a directed verdict. [107—61]

I confess in this case there is not any theory of the law that I can conceive of upon which I could tell the jury to predicate a verdict based upon facts, or a reasonable inference. There is no evidence that anyone ever saw any sparks emitted from this engine, and the only evidence with relation to sparks is that the first witness at one time saw some sparks emitted from an engine that was laboring and going up this grade with a train of cars. And there is an absence of any evidence as to any inflammable

material either on the railroad track or between the railroad track and this warehouse or under the warehouse anywhere, and the further testimony is that at the time this particular train came to the station on the east, that the engineer looked back and saw the fire and remarked that it looked as though the whole town of Badger was aflame.

Now, for the Court to submit to the jury the question of fact as to whether a spark emitted from an engine in ten or fifteen or twenty-five minutes could create a flame that would cast such a reflection as to inspire the thought of this fireman, burning a wooden warehouse set on piles three and a half or four feet from the ground, and then the evidence shows that at ten o'clock, shortly after the train went by the fire was contained within the scope disclosed by the witness—I cannot conceive how I can do that.

I am very loath always to grant nonsuits. I rarely do it, but when there is an absence of facts—Now then, the statement of Mr. Howe. The fact that the fire in the engine was the only fire disclosed by the [108—62] evidence, I do not think that that could possibly be—supposing no evidence was presented, the Court could not possibly let a verdict stand upon the mere fact that an engine with fire in it passed a warehouse fifty feet away and the warehouse was aflame half an hour afterwards and the light created the impression upon the fireman as disclosed here.

I think the motion must be granted, and that will be the order.

Mr. GRAHAM.—Exception, if the Court please.

The COURT.—Note an exception to that. [109—63]

ORDER SETTLING BILL OF EXCEPTIONS.

The within and foregoing bill of exceptions coming on this day for settlement, both parties being present by their respective counsel, there being no amendments proposed—

IT IS HEREBY ORDERED that the within and foregoing bill of exceptions is hereby settled.

Done in open court this 23d day of January, 1928.

JEREMIAH NETERER,
District Judge.

Service of attached bill of exceptions proposed by plaintiff admitted by receipt of copy thereof this 12 day of November, 1927.

GEO. T. REID,
C. H. WINDERS,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 23, 1928. [110]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the United States District Court for the Western District of Washington, Northern Division:

You will kindly prepare and certify the record on

appeal prosecuted by the above-named defendant, consisting of the following papers and records, to wit:

1. Summons with return of service thereon.
2. Amended complaint.
3. Answer.
4. Stipulation.
5. Order allowing filing of amended complaint.
6. Clerk's minute entry of trial proceedings on November 4, 1927.
7. Judgment.
8. Defendant's statement of costs and disbursements.
9. Petition for new trial.
10. Objections of plaintiff to defendant's statement of costs and disbursements. [111]
11. Affidavit of C. H. Winders in support of cost bill.
12. Order denying petition for new trial.
13. Order on appeal from decision of Clerk *in re* taxation of costs.
14. Bill of exceptions.
15. Assignment of errors.
16. Notice of appeal.
17. Bond on appeal.
18. Citation on appeal.
19. Clerk's minute entries as to taxation of costs.
20. This praecipe.

HOWE & GRAHAM,
Attorneys for Plaintiff.

Service of the above and foregoing praecipe acknowledged by receipt of copy thereof, this 20th day of April, 1928.

C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed Apr. 20, 1928. [112]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 112, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [113]

Clerk's Fees (Act of Feb. 11, 1925) for making record, certificate or return, 271 folios at 15¢ $40.65

Certificate of Clerk to Transcript of Record with seal ..... .50

Total $41.15

I hereby certify that the above cost for preparing and certifying record, amounting to $41.15, has been paid to me by the attorneys for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 30th day of April, 1928.

[Seal]

ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [114]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To Northern Pacific Railway Company, a Corporation, C. H. Winders, Its Attorney, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, notice of appeal having heretofore been served upon you, said appeal being from a final judgment signed, filed and entered on the 4th day of November, 1927, in that certain suit, being cause No. 11162, wherein General Insurance Company of America, a corporation, is plaintiff, and you are defendant and appellee, to show cause, if any there be, why the judgment of nonsuit and dismissal rendered against said plaintiff and appellant should not be corrected, and why justice should not be done to the parties in that behalf. [115]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 13th day of April, A. D. 1928.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received a copy of the foregoing this 13 day of Apr., 1928.

C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed Apr. 13, 1928. [116]

[Endorsed]: No. 5484. United States Circuit Court of Appeals for the Ninth Circuit. General Insurance Company of America, a Corporation, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 3, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Printed Transcript of Record. Filed May 17, 1928. Paul P. O'Brien, Clerk.

No. 5484

United States
Circuit Court of Appeals
For the Ninth Circuit.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the September Term, A. D. 1928, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City of Seattle, in the State of Washington, on Monday, the seventeenth day of September, in the year of our Lord one thousand nine hundred twenty-eight. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Donald G. Graham, counsel for the appellant, and by Mr. Arthur E. Simon, counsel for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1928, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presid-

ing; Honorable FRANK H. RUDKIN, Circuit Judge; Honorable FRANK S. DIETRICH, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich and William H. Hunt, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and HUNT, Circuit Judges.

HUNT, Circuit Judge.—The plaintiff insurance company seeks reversal of a judgment rendered against it following a motion for a nonsuit in an action to recover from the railroad company damages by reason of a fire alleged to have been caused by sparks from defendant's locomotive, alleged to have been negligently constructed and operated.

The insurance company had issued two policies of fire insurance to one Agor, covering wool and sacks while contained in a warehouse at Badger, Washington. On May 2, 1926, at about 9:50 or 10 o'clock P. M., the warehouse and its contents were destroyed by fire. The complaint alleged that the fire was negligently started by sparks or cinders and that the locomotive was so negligently constructed and operated as to permit and cause sparks, cinders and live coals to escape and to start a fire which spread to the wool and sacks stored in the warehouse. The insurance company paid the loss, and under claim of subrogation to Agor's rights, instituted this action. Defendant admitted that the property was destroyed by fire but denied the allegations of negligence. At the conclusion of plaintiff's testimony, judgment in favor of the railroad company was ordered. The insurance company appealed.

At Badger the railroad tracks run in a northerly and southerly direction. There is neither agent nor telegraph operator at the place. The burned warehouse in which the wool was stored was built from three to four feet above the ground and was open from the bottom to the ground. It had a shingle roof and was between thirty-five and forty feet in length, situated east of the main line track. A wagon road runs alongside the building. Between the main line and the warehouse there were a passing track and a spur which served the warehouse. On the west side of the main line track were a railroad tool-house and an abandoned gas storage

tank. As the railroad approaches Badger there is a heavy uphill grade. During the day of the fire the wind had been blowing from the west. About 9:45 P. M. a freight train consisting of seventy cars and two engines came up grade toward Badger, and passed the warehouse. About 10 o'clock Fernandez, a sheep-herder, who lived in a shack about 150 yards south of the warehouse and on the same side of the track, saw the warehouse on fire on the south or southwest side, which was the corner nearest the railroad tracks. He testified that the fire appeared to have started from the ground and that it was burning toward the roof, and quickly consumed the whole building. He stated that at previous times he had seen Russian thistles in the vicinity and that when the wind blew he had seen them blowing; that on some previous occasions he had seen much smoke and sparks coming from locomotives as they came up toward Badger; that he went to bed on the evening of the fire about 7:30 or 8 o'clock, and did not see any smoke or sparks on the night of the fire; that there were only three men at the station on the day of the fire; that the section foreman had a cabin north of the warehouse and that another employee of the railroad lived in a cabin west and nearly opposite the warehouse. To the south of the warehouse there was an abandond cistern and an ice-house a distance of about 450 feet from the cabin of the section foreman. Fernandez testified that there were some sheep men with their herds in the vicinity of Badger and that about the date of the fire there

had been some trouble between Fernandez and another sheep man; that on the afternoon of the day of the fire Fernandez asked the section foreman and his helper to go with him into the hills and drive some sheep which belonged to another man away from the Agor range; that when they reached the place where the sheep were they found a boy in charge and told him to tell his father to keep off of Agor's range. Witness testified that the warehouse was generally kept locked and that usually the key was left either in the door or in a hole in the floor by the door; that if anyone reached into the hole he could find the key; that there had been some sheep shearers at Badger some ten days prior to the fire and that they had slept in the warehouse. It appeared also that in the debris after the fire some cooking utensils were found. The fireman of the helper engine which pulled the freight train up to and through Badger testified that when the train went through Badger he saw no fire, but that when he reached Vista, a run of fifteen or twenty minutes from Badger, he looked back and remarked to the engineer that it looked as if the whole town of Badger was afire; that in his opinion there was nothing in connection with the operation of the engines which could have had anything to do with the fire. There was no testimony as to what fuel was used on the locomotive; of what, if any, equipment was used to prevent the emission of sparks, or what, if any, methods of operation were employed to prevent the escape of sparks or cinders.

The action is based upon negligence arising out of construction and operation of defendant's locomotive, and as no person saw fire directly communicated to the warehouse, the plaintiff was obliged to make proof of communication of the spark or fire by circumstances sufficient to uphold a finding that the fire was set by a spark from the locomotive of the defendant company.

Two locomotives were pulling the long train up a stiff grade upon which, at other times, engines had been seen to emit a great deal of smoke and some sparks; the country was dry and there were tumbleweeds and thistles in the vicinity of the warehouse; there was no fire in any building near the warehouse; only three persons lived anywhere near the warehouse; no one was seen in the vicinity of the building that day; no one had slept in the building for ten days or more prior to the fire; there was no fire when the train passed, but some fifteen minutes later the building was a mass of flames, seen by the fireman of the train when it reached Vista. When first seen by the sheep-herder, the fire appeared to have started on the side or corner nearest the tracks and to be burning from the ground up. It is the opinion of a majority of the Court that although the question is not free from doubt, there were facts and circumstances sufficient to call for submission to the jury.

But however that may be, we are of one mind in deciding the question whether proof that sparks or cinders from the locomotives hauling the train set the building on fire raised the presumption that

there was negligent construction or operation of the locomotive or locomotives from which the sparks or cinders were emitted. We are referred to decisions which hold that where the circumstances lead to the conclusion that the origin of the fire was from a locomotive, there is a *prima facie* case and the burden of showing that there was no negligence in construction or operation of the locomotive is upon the railroad company. The Supreme Court of Washington seems to have accepted that view. (Thorgrimson vs. Northern Pacific Ry., 64 Wash. 500; Shearman & Redfield on Negligence, sec. 675 et seq.; Elliott on Railroads, sec. 1766.) But in the better considered cases in the federal courts it is held that the question is one of general law and that it cannot be said that the mere ignition by sparks is *prima facie* evidence of negligence of the railroad company. Such was the opinion expressed by Judge Taft for the Court of Appeals of the Sixth Circuit in Garrett vs. Southern Ry., 101 Fed. 102, a case quite like the one at bar, where the Court, after recognizing that there is contrariety of decision, cited the Nitroglycerin Case, 15 Wall. 524, and invoked the principle that one who charges negligence must prove it by showing that defendant, by his act or by his omission, has violated some duty incumbent upon him which has caused the injury complained of.

Again, in Toledo St. Louis & W. R. Co. vs. Star Flouring Mills, 146 Fed. 953, the Court of Appeals, speaking through Judge Lurton, after citing decisions presenting the conflict upon the question

whether evidence that a fire was started by escaping sparks constitutes, without more, a *prima facie* case of negligence, affirmed Garrett vs. Southern Ry., *supra*. The Court held that the more logical view is that the gravamen of an action for loss of property by fire communicated by sparks is negligence, and that "inasmuch as a railway company may lawfully use locomotives, it cannot be made liable for a loss from sparks emitted unless plaintiff shows such sparks to have been negligently emitted," and that the burden of showing negligence is upon him who affirms it. See, also, Cincinnati etc. Co. vs. South Fork Coal Company (CCA. 6), 139 Fed. 528; Louisville & Nashville R. Co. vs. Bell (CCA. 6), 206 Fed. 395. We agree with the general doctrine of the federal cases cited. Slight evidence may be sufficient to show negligence, but where, as here, there is really nothing beyond the fact that the building was burned by sparks which, by common knowledge, must to some extent escape from a locomotive hauling a train, there is no evidence which calls for rebuttal.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Oct. 15, 1928. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5484.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Oct. 15, 1928. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-one (121) pages, numbered from and including 1 to and including 121, to be a full, true and correct copy of the entire record, excluding original exhibits of the above-entitled cause in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of December, A. D. 1928.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 10 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

No. [redacted] 23

October Term, 1928

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

JAMES B. HOWE,
DONALD G. GRAHAM,
JAMES B. HOWE, JR.,
Counsel for Petitioner.

Stuart Building,
Seattle, Washington.

MARTIN & DICKSON, *Printers*

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In the Supreme Court
OF THE
United States

No.....

October Term, 1928

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable the Supreme Court of the United States:

The petition of General Insurance Company of America respectfully shows:

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition for a writ of certiorari to review and reverse a judgment of the United States Circuit Court of Appeals for the Ninth Circuit for error in

affirming a judgment of nonsuit of the District Court of the United States for the Western District of Washington.

Your petitioner is a Washington corporation. Respondent is a Wisconsin corporation. Petitioner, as plaintiff, brought suit against respondent in the District Court for the recovery of more than $3,000. The action was for the recovery of the value of certain wool which was destroyed by a fire alleged to have been caused by the negligent emission of sparks, cinders or live coals from one of respondent's locomotives. (R. 3-10.)

Your petitioner issued two policies of fire insurance to one Peter Agor. These policies covered wool and sacks while contained in a warehouse at Badger, Washington. On May 2, 1926, while these policies were in force, the warehouse and its contents were destroyed by fire. (R. 4, 7, 88, 100.)

Your petitioner paid the loss sustained by Peter Agor, which amounted to $20,481.90, and, under claim of subrogation, brought suit against respondent. (R. 5, 6, 8, 9, 95.) Petitioner alleged that the fire was started by sparks, cinders or live coals emitted from one of respondent's locomotives and that said locomotive was so negligently constructed and operated as

to permit and cause sparks, cinders or live coals to escape and cause the fire. (R. 5, 8.)

Respondent admitted that the wool was destroyed by fire, but denied that one of its locomotives set the fire and denied that it was guilty of any negligence. (R. 11, 12.)

At the conclusion of petitioner's evidence respondent moved for a judgment of nonsuit. (R. 100.) The court granted the motion (R. 100), to which petitioner duly excepted (R. 104), and thereafter judgment of nonsuit was entered. (R. 16.)

Petitioner duly filed assignments of error (R. 40-42), and then appealed (R. 39-44, 104-109), specifying as errors relied upon that "the court erred in granting the motion for judgment of nonsuit and entering the judgment of nonsuit for the reason that the granting of said motion and the entering of said judgment wrongfully prevented the jury from considering and deciding questions of fact alleged in plaintiffs' complaint and testified to by plaintiff's witnesses."

On October 15, 1928, the Circuit Court of Appeals rendered its opinion and affirmed the judgment of nonsuit of the District Court and, upon the same day, its judgment was filed and entered. (R. 120, 121.)

In its opinion (R. 114-120) the Circuit Court of Appeals held:

1. That petitioner's evidence was sufficient to warrant the jury finding that one of respondent's locomotives set the fire and therefore was sufficient to call for the submission of this question to the jury. (R. 118.)

2. That petitioner's evidence was not sufficient to raise a *prima facie* presumption that respondent was negligent in setting the fire or to warrant the jury inferring that respondent was negligent in setting the fire. (R. 119, 120.)

From these holdings the Circuit Court of Appeals concluded that your petitioner's evidence was not sufficient to carry the case to the jury and that the judgment of nonsuit was proper.

ASSIGNMENTS OF ERROR

1. The Circuit Court of Appeals erred in finding and holding that your petitioner's evidence was not sufficient to raise a *prima facie* presumption that respondent was negligent or to warrant the jury inferring that respondent was negligent.

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTNORARI HEREIN APPLIED FOR:

1. The decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McCullen v. Chicago & Northwestern Railway Company,* 101 Fed. 66, upon the same matter.

2. The decision decides an important question of local law in conflict with applicable local decisions of the Supreme Court of the State of Washington, to-wit, the following:

Thorgrimson v. Northern Pacific Railway Company, 64 Wash. 500;

Northwestern Mutual Fire Association v. Northern Pacific Railway Company, 68 Wash. 292;

Fireman's Fund Insurance Company v. Oregon-Washington Railroad & Navigation Company, 96 Wash. 113.

These cases hold proof that a fire is of railroad origin necessitates the determination of a question of fact—of the question of whether or not the railroad was negligent in setting the fire—and requires the

court to submit this issue of fact to the jury. The Circuit Court of Appeals conceded this to be the Washington law, but refused to follow it.

Your petitioner presents herewith to this court and files herewith as an exhibit hereto a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals, together with your petitioner's brief in support of this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 5484, General Insurance Company of America, a corporation, Appellant, v. Northern Pacific Railway Company, a corporation, Appellee, and that the said judgment of the said Circuit Court of Appeals may be reversed by

this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray and so forth.

GENERAL INSURANCE COMPANY
OF AMERICA,
By HAWTHORNE K. DENT,
Its President.

JAMES B. HOWE,
DONALD G. GRAHAM,
JAMES B. HOWE, JR.,
Counsel for Petitioner,
Stuart Building,
Seattle, Washington.

In the Supreme Court
OF THE
United States

No.....

October Term, 1928

GENERAL INSURANCE COMPANY OF AMERICA,
a Corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Respondent.

Brief of Petitioner in Support of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

I.

THE OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals is reported in 28 Fed. (2d) 574, and in the Record at pages 114-120. The opinion of the District Court appears in the Record at pages 101-104.

II.

JURISDICTION

The date of the judgment to be reviewed is October 15, 1928. (R. 121). Jurisdiction of this Court to review by the writ of certiorari the judgment of the Circuit Court of Appeals is invoked under Judicial Code Section 240, as amended by the act of February 13, 1925, 43 Statutes at Large 938.

III.

STATEMENT OF THE CASE

On the day of the fire the wind was blowing from the railroad tracks toward the warehouse which contained the wool which was destroyed. (R. 51). About 9:45 P. M., which was about fifteen minutes prior to the time the fire was discovered, one of the railroad company's freight trains passed by the warehouse. (R. 84, 86). The train was hauled by two locomotives, consisted of seventy freight cars (R. 85), and was going up a heavy uphill grade as it passed the warehouse. (R. 59, 86, 91).

These facts are pointed out in the opinion of the Circuit Court of Appeals. (R. 115-118.) The opinion stated the facts fairly, but fails to point out that the railroad sometimes divided its trains in order to avoid the heavy laboring caused by the upgrade. (R. 91.) Inasmuch as the country was very dry (R. 71), the

jury, if permitted to pass upon the question, might have decided that the railroad company was negligent in not dividing its 70-car train which passed the warehouse on the night of the fire. It is, however, unnecessary to review the facts, because the Circuit Court of Appeals found that your petitioner's evidence was sufficient to warrant the jury finding that one of the railroad company's locomotives set the fire. This has been pointed out under heading A in the petition for the writ of certiorari where a full statement of the case has been given. In the interest of brevity such statement is not repeated here.

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the judgment of nonsuit of the District Court, because the question of whether or not the railroad company was guilty of negligence was a question of fact which your petitioner was entitled to have the jury pass upon.

V.

ARGUMENT

(a) The Issue

This case presents no question concerning the admission or the rejection of testimony. The only question it presents is that of the effect of the evidence

which is in the record—the question of whether or not that evidence was sufficient to require the case to be submitted to the jury.

The Circuit Court of Appeals held that petitioner's evidence (1) was sufficient to warrant the jury concluding that the railroad company set the fire, but (2) was not sufficient to authorize the jury inferring and finding that the railway company was guilty of negligence.

Your petitioner contends that the tracing of the cause of a fire to a railway company raises a question of fact—the question of whether or not the railway company was negligent in causing the fire—and authorizes the drawing of the inference (or raises the *prima facie* presumption) that the railway company was guilty of negligence, particularly when the setting of the fire is wholly unexplained by the railway company.

There is no liability on the part of a railway company unless it is guilty of negligence, but, your petitioner contends, the negligence of a railway company may be established as fully and competently by an inference which a jury may draw from facts establishing the origin of the fire as it might be by direct evidence. From the fact that a railway company

caused a fire the jury may draw, or refuse to draw, the inference that the railway company was negligent; but the question can not be decided one way or the other without a question of fact being determined and, therefore, a court may not enter a judgment of nonsuit, when a plaintiff's evidence is sufficient to fasten the origin of the fire upon the railway company, without invading the province of the jury and depriving the plaintiff of the right to have the jury ascertain the facts.

The issue, simply stated, is this: Does proof of the origin of a fire authorize the drawing of an inference of negligence therefrom?

This question has been before the courts ever since railroads have been operated, but the Supreme Court of the United States has never passed upon it. There is conflict in the decisions of the state courts, but the Washington cases and the Federal cases decide this issue in favor of the contention of your petitioner.

Your petitioner contends: (1) that the decision of the Circuit Court of Appeals is contrary to the law as decided by the Federal courts; (2) that the decisions of the Supreme Court of the State of Washington establish, as a matter of substantive local law, the right of a plaintiff able to trace a fire to a railway

company to have his case go to the jury, and that the Circuit Court of Appeals erred in failing to follow the local law.

(b) Favorable Federal Cases

McCullen v. Chicago & N. W. Ry. Co., 101 Fed. 66 (C.C.A. 8th Circuit), arose in South Dakota. The facts were very similar to the facts in the case at bar. It is squarely in point. In the opinion Thayer, J., said:

> "It is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. * * * These reasons have led most courts to hold,—and the doctrine, as we think, should be adhered to,—that proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption that, through a want of proper care on the part of the owner thereof or its employes, the locomotive in question was not provided with a proper spark arrester, or that it was not at the time in a good state of repair, or that its locomotive was carelessly handled."

The *McCullen* case was cited with approval in *Great N. Ry Co. v. Coats,* 115 Fed. 452 (C.C.A. 8th Circuit), which also arose in South Dakota. In the *Coats* case the evidence established a specific act of negligence, but it is apparent from that portion of the opinion quoted below that Thayer, J., was of the

opinion that a presumption of negligence was established by the tracing of the origin of the fire and did not depend, for its existence, upon the proof of the specific act of negligence. Thayer, J., said:

> "The testimony in question not only created a presumption of negligence on the part of the defendant company, but in so far as it showed the company had allowed combustible material to accumulate on its right of way, it established a specific act of negligence, to which the injury complained of might well be attributed."

Eddy v. Lafayette, 49 Fed. 807, 163 U. S. 456, arose in Indian Territory. The trial court charged the jury as follows:

> "The Court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence."

The plaintiff recovered judgment in the District Court. The case was carried to the Circuit Court of Appeals, seventy-four errors being noted in the assignment of errors. In referring to the instructions given the jury by the trial court the Circuit Court of Appeals said:

> "It also instructed them, in substance, that the fact that a fire had been occasioned by sparks from a passing engine was *prima facie* evidence of negligence. * * * It is also incumbent on a rail-

way company to show that it has used all those reasonable precautions which the law exacts, when it is proven that adjacent property has been damaged by a fire, which was occasioned by sparks or cinders from a passing locomotive. The decisions to this effect are both numerous and uniform. Shear & R. Neg. Sec. 676, 678 and citations."

The Circuit Court of Appeals affirmed the judgment of the District Court and the case was then carried to the United States Supreme Court where it was contended that the instruction above quoted was erroneous and that the Circuit Court of Appeals erred in not correcting the alleged error. The Supreme Court affirmed the judgment of the Circuit Court of Appeals, but refused to pass upon the propriety of the instruction and disposed of this claim of error in the following language:

"It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the Circuit Court of Appeals."

The *Eddy* case was cited with approval in the *McCullen* case and the *Coats* case.

Missouri Pac. R. Co. v. Texas & P. R. Co., 33 Fed. 360;

Missouri Pac. R. Co. v. Texas & P. R. Co., 33 Fed. 361.

These two cases arose in Louisiana and were decided in 1888. In each case the origin of the fire was traced to the defendant railway company. In neither case does the opinion disclose any evidence of negligence. In each case the presumption theory is referred to and the claimant was allowed to recover from the defendant railway company. It does not appear, in either opinion, that there was any statute in Louisiana making proof of the origin of a fire *prima facie* evidence of negligence and in the later Louisiana case of *Fuller v. Chicago R. I. & P. Ry. Co.* (1915), 137 La. 997, 69 So. 804, there is no reference to a statute although the presumption theory is advanced and followed.

(c) Hostile Federal Cases

The cases discussed under this heading are the five cases cited by the Circuit Court of Appeals in support of its decision. It is submitted that not one of these cases decides the issue at bar contrary to the contention of your petitioner. These cases will be considered in the order in which they were decided.

Nitroglycerine Case, 15 Wall. 524, 21 L. ed. 206.

This case involved the question of the liability of an express company for the explosion of a box of nitroglycerine which was in its custody. The case was tried by the court without the intervention of a

jury. The court found that the defendants did not know, or have any means of knowing, what the box contained or that it was dangerous.

The manner in which the box was handled was fully explained and, from the explanation, the court found that there was no negligence in the manner in which the box was handled. This was a finding upon a question of fact and would have been none the less so had the court found that the defendants had been negligent. The court could not have decided the case one way or the other without deciding either that there was, or was not, negligence. If there had been no explanation of the explosion the court might have infered that it was caused by negligent handling of the box. But because of the explanation which convinced the court that there was no negligence there was no cause for inference to the contrary.

Your petitioner does not contend that proof of a fire conclusively establishes negligence or liability. Your petitioner merely contends that it may *and that it does* when the fire is unexplained and the manner in which it occurred, or the fact that it occurred, convinces the jury that there was negligence, or causes the jury to draw the inference that there was negligence. The *Nitroglycrine* case was not one in which the plaintiff was nonsuited, without being given the

opportunity to have a judicial determination of the care exercised by the party causing the damage and in possession of all the information in regard to the happening of the accident.

Garrett v. Southern Ry. Co., 101 Fed. 102.

This case arose in Tennessee and the opinion was written by the present Chief Justice of the United States Supreme Court. The trial court submitted the case to the jury, which found for the defendant. The sole question presented to the Circuit Court of Appeals for the Sixth Circuit was whether the rule which the trial court laid down as to the burden of proof was correct. The trial court instructed the jury:

> "That, if the jury found as a fact that under the present approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence, then the jury would be justified in inferring as a fact, from the mere circumstance of the fire and its origin in the emission of sparks, that the fire was caused by the negligence of the defendant. The court declined to charge the jury, as a matter of law, that mere proof that the fire was caused by sparks from an engine was *prima facie* evidence of the negligence of the defendant."

It is very evident from the opinion and its reference to the *Nitroglycerine* case that the court decided that proof of the ignition of a fire by sparks (1) raises

no presumption of law as to negligence, but (2) does authorize the drawing of an inference of fact which, if drawn, establishes negligence as a fact and renders inapplicable the rule of the *Nitroglycerine* case which holds, merely, that there is no liability unless negligence is somehow established.

The *Garrett* case does not hold that a jury may not infer negligence, from the fact of the fire, and thereby establish negligence. On the contrary it authorized such an inference and, your petitioner submits, it is highly favorable to your petitioner's contention. The *Garrett* case is the case chiefly relied upon by the court in deciding the case at bar against your petitioner.

Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co., 139 Fed. 528.

This case merely affirms the rule that where the gravamen of the action is negligence the plaintiff must establish negligence. The tenor of the opinion, by Lurton, J., is that negligence may be inferred from the facts and circumstances surrounding the happening of the accident. The opinion cites the *Garrett* case and does not cite the *McCullen* case (which was reported in the same volume of the Federal Reporter as the *Garrett* case), but it recognizes the fact that there are many jurisdictions in which the mere fact

of fire started by sparks is held, irrespective of statute, to be *prima facie* evidence of negligence. The trial court refused to direct a verdict, and permitted the case to go to the jury, which found for the plaintiff. The judgment of the trial court was affirmed.

Toledo, St. Louis & W. R. Co. v. Star Flouring Mills Co., 146 Fed. 953, arose in Ohio under a statute making the fact that a fire was set to property adjacent to a railroad by sparks escaping from a locomotive *prima facie* proof of the railway company's negligence. The trial court properly let the case go to the jury, but its judgment was reversed because of an instruction to the effect that the statutory *prima facie* proof of negligence could be overcome only by a preponderence of evidence showing the defendant's lack of negligence. The decision admitted that proof of the fire was sufficient to require the submission of the case to the jury and the opinion by Lurton, J., dealt with the question of the force of the statutory presumption. The fact that this decision was cited in the case at bar indicates that the court overlooked the real issue which was not where the burden of the proof rested after a case for the jury had been made out, but was whether or not a case for the jury had been made out.

Louisville & N. R. Co. v. Bell, 206 Fed. 395, arose in Tennessee where there was no statute relating to the setting of fires. A motion for a directed verdict was denied and the case was submitted to the jury, which found for the plaintiff, and the judgment of the trial court was affirmed. The Circuit Court of Appeals found that there was proof tending to show that the railway company's locomotive was negligently operated and specifically refused to pass upon the question of whether or not the mere fact of the setting of the fire would have been sufficient to carry the case to the jury.

In not one of the cases cited in the opinion of the Circuit Court of Appeals, in the case at bar, was there a judgment of nonsuit or a directed verdict. Not a single Federal case has been found in which the jury has been denied the privilege of drawing the inference that the defendant railway company was negligent from the fact that the railway company set the fire. Every case (save the *Nitroglycerine* case which was tried by the court) went to the jury. The correctness of your petitioner's contention is clearly illustrated by two English cases too closely in point to be disregarded.

(d) The English Cases

Aldridge v. Great W. R. Co., 3 Man. & G. 515, 133 Eng. Rep. 1246, was decided in 1841. The complaint alleged that the locomotive of the defendant was carelessly managed and operated. The parties agreed that a locomotive set the fire in question and that the locomotives used upon the railway were such as were usually employed on railways. The parties agreed that the locomotive which set the fire complained of was used, at the time, in the ordinary manner and for the purposes authorized by the act of parliament incorporating the railway company. The property which was burned was adjacent to the railway tracks. Upon these agreed facts the case was submitted to the court for its decision, the court being requested to enter judgment for the plaintiff or judgment of nonsuit, according to its opinion. A statute permitted the court to accept and decide a case in which all the facts were agreed upon.

The court held that the facts stated did not permit the entry of a judgment for the plaintiff or a judgment of nonsuit because the court could not draw the inference that the defendant was negligent, or find that the defendant was not negligent, without deciding a question of fact, and, therefore, that the case was not the kind of a case contemplated by the statute

relating to agreed cases and would have to go to trial in order that the question of fact might be decided. It is worthy of note that the agreed statement of facts did not state or show that such a fire had ever happened before or that sparks had ever previously come from the locomotive. One of the three judges (all of whom agreed in the decision) remarked that if the judges were called upon to decide the question of fact of whether the railway company was negligent there would probably be a difference of opinion.

Pigott v. Eastern Counties R. Co. (1846), 3 C. B. 329, 136 Eng. Rep. 92, supports the view that proof of the origin of the fire warrants the drawing of the inference that the defendant railway company was negligent in setting the fire. In the opinion Tindall, C. J., said:

> "The defendants are a company entrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage: and the law requires of them that they shall, in the exercise of the rights and powers conferred upon them, adopt such precautions as may be reasonably necessary to prevent damage to the property of third persons through or near which their railway passes. The evidence in this case is abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendant's engines; and there was no proof of any precaution adopted by the

company to avoid such a mischance. I therefore think that the jury came to a right conclusion, in finding that the company was guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance * * *."

Maule, J., referring to the fire, said:

"I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence in the absence of evidence to shew that something had been done by the company to lessen the chances of danger. It appeared that no steps of that sort had been taken, * * *. Upon the whole I think the verdict would have been wrong if it had been the other way."

The rule in the State of Washington is illustrated by the three cases which will now be given attention.

(e) WASHINGTON CASES

Thorgrimson v. Northern Pacific,
64 Wash. 500.

In the opinion the court said:

"The rule putting the burden on the railway company to explain the cause of a fire following a passing engine, to which this court is probably committed (*Overacker v. Northern Pac. R. Co.,* ante p. 491, 117 Pac. 403), and which counsel relied on to carry the case to the jury on the questions of equipment and operation, is one of necessity, and is applied so that justice may not be defeated. * * * It is the proof of setting the fire * * * that raises the inference of negligence and shifts the burden of proof."

Northwestern Mut. Fire Assn. v. N. P. R. Co., 68 Wash. 292.

In the opinion the court said:

"In a foot note to the case of *Atchison etc., R. Co. v. Geiser*, 1 Am. & Eng. Ann. Cases, the annotator, at page 815, says:

" 'In England and in many of the states of the Union, it is held that the mere fact of communication of fire by a railroad engine is, of itself, sufficient to raise a presumption of negligence against the railroad company, or, in other words, that proof of such communication is sufficient to make out a *prima facie* case of negligence against the defendant in an action for injuries caused by the fire.'

"After supporting this statement by citing numerous cases, the annotator, at page 816, further says:

" 'In some jurisdictions this doctrine is the result of express legislative enactment, or is, at least, sanctioned by statute. Such, as will appear from the decisions above cited from those states, is the case in Arkansas, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, New Jersey, North Dakota, Ohio, Utah, and Vermont. But in many, if not all, of the other states from which decisions are cited above, the rule has been adopted irrespective of statute; and in a number of cases it has been expressly stated that the principle is one of the common law, and not dependent upon legislative enactment.'

"This statement, which is in harmony with our own decisions, is also supported by additional citations of authority from North Carolina, South Dakota, and Tennessee."

If not before, the rule contended for certainly became the law in the State of Washington in *Fireman's F. I. Co. v. Oregon-Wash. R. & N. Co.*, 96 Wash. 113, in which case counsel for the defendant railway conceded that it was the law. In this case, in which there was no direct proof of any act of negligence, the court held that the plaintiff's circumstantial evidence was sufficient to carry the case to the jury and support the jury's verdict in plaintiff's favor. The defendant's evidence showed that the defendant's locomotive was equipped with the best known appliances on the market for the purpose of arresting sparks. The court held the plaintiff's circumstantial evidence warranted the jury passing upon the question of whether said appliances were properly adjusted and kept in good repair and also upon the question of whether the locomotive was operated with ordinary and reasonable skill.

Your petitioner contends that these three Washington cases establish, as a matter of substantive law, the right of jury trial in a plaintiff able to prove a fire of railroad origin and that the Circuit Court of Appeals erred in failing to follow the local law and denying your petitioner the privilege of having the jury pass upon the question of the negligence of the respondent railway company.

(f) Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that a writ of certiorari should be granted to review and reverse the decision of the Circuit Court of Appeals.

James B. Howe,
Donald G. Graham,
James B. Howe, Jr.,
Counsel for Petitioner.

Stuart Building,
Seattle, Washington.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 23

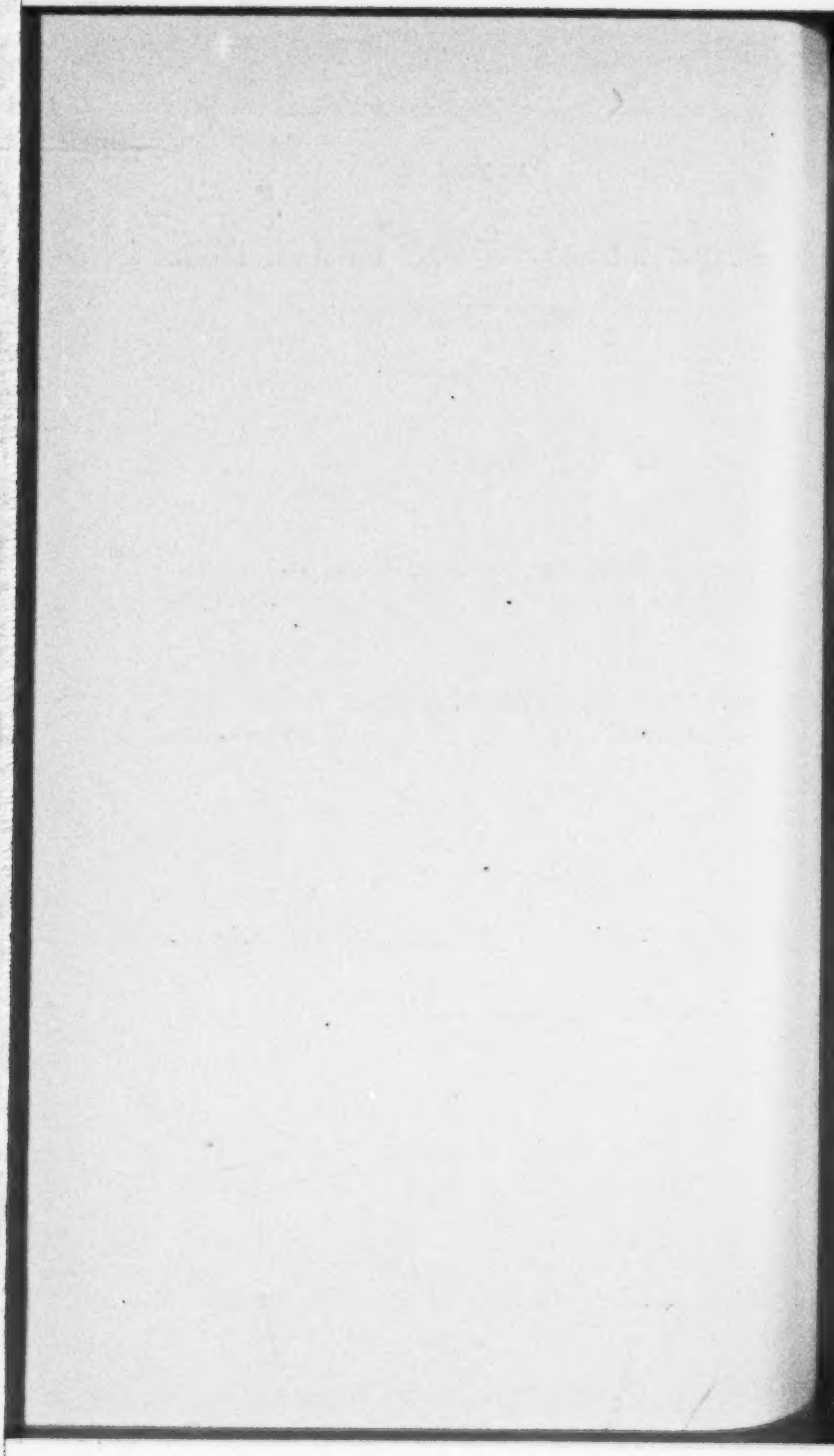
GENERAL INSURANCE COMPANY OF AMERICA, a corporation, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Respondent.

Brief of Petitioner (Plaintiff) On Merits

JAMES B. HOWE,
DONALD G. GRAHAM,
JAMES B. HOWE, JR.,
Counsel for Petitioner,
White-Henry-Stuart Building, Seattle, Washington



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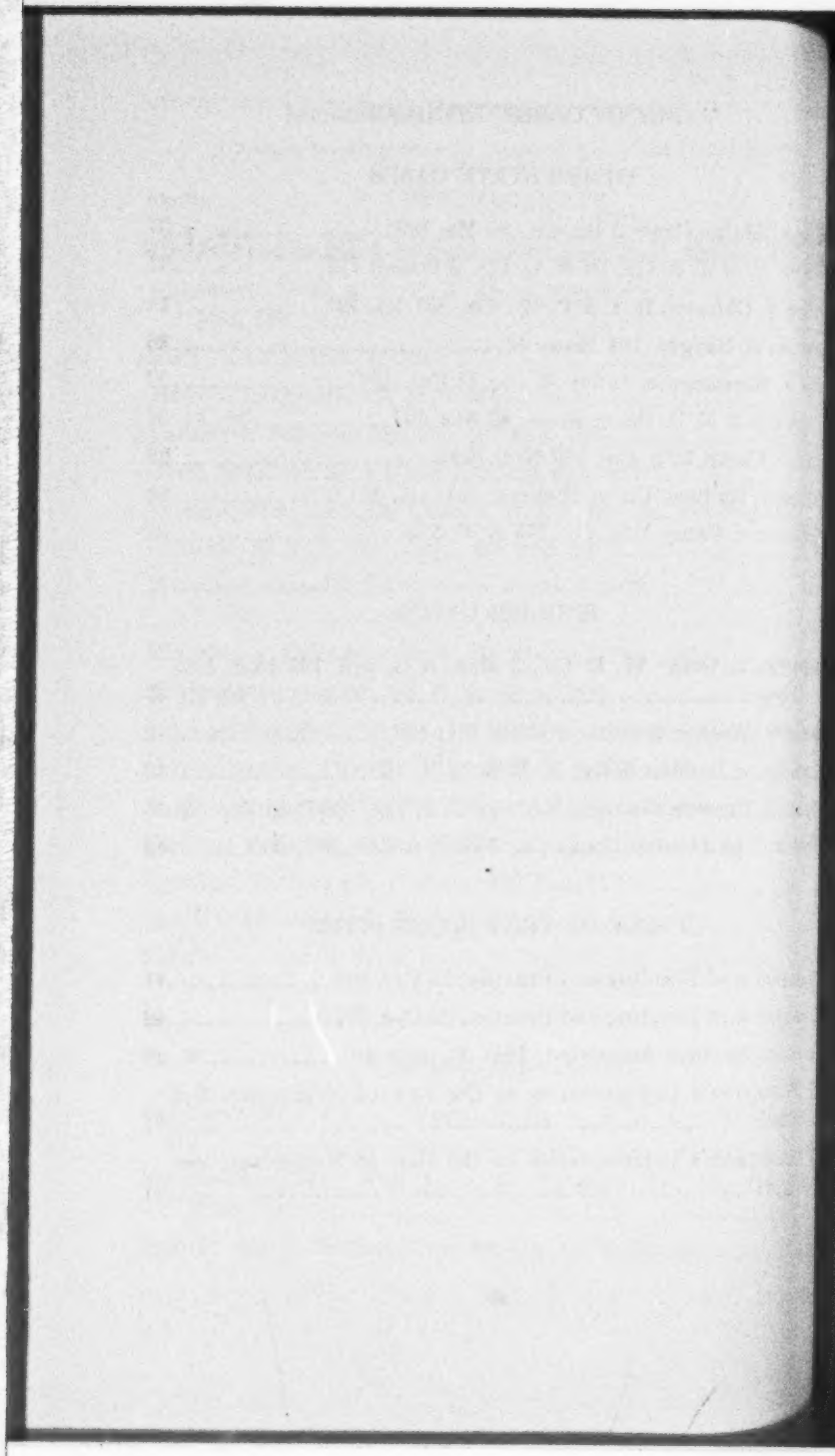

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 23

GENERAL INSURANCE COMPANY OF AMERICA, a corporation, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Respondent.

Brief of Petitioner (Plaintiff) On Merits

OPINIONS OF COURTS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 28 Fed. (2d) 574 and in the record at pages 114-120. The opinion of

the District Court for the Western District of Washington, Northern Division, appears in the record at pages 101-104.

JURISDICTION OF THIS COURT

The date of the judgment of the Circuit Court of Appeals which is to be reviewed is October 15, 1928 (R. 121). Petitioner heretofore petitioned this court for a writ of certiorari, invoking this court's jurisdiction under Judicial Code Section 240, as amended by the act of February 13, 1925, 43 Statutes at Large 938. This court made an order granting said petition on February 25, 1929 (R. 123).

STATEMENT OF THE CASE

Petitioner is a Washington corporation (R. 3). Respondent is a Wisconsin corporation (R. 4). Petitioner, as plaintiff, brought suit against respondent, as defendant, in the United States District Court for the Western District of Washington, Northern Division, for the recovery of $20,481.90 (R. 3-10).

Prior to the commencement of the suit, petitioner issued two policies of fire insurance to Peter Agor. These policies covered wool and sacks while contained in a warehouse located at Badger, in the State of Washington. On May 2, 1926, while these policies

were in force, the warehouse and its contents were destroyed by fire (R. 4, 7, 88, 100). Petitioner paid the loss sustained by Peter Agor, which amounted to $20,481.90, and, under claim of subrogation, commenced its suit against respondent. (R. 5, 6, 8, 9, 95.)

Petitioner alleged that the fire was started by sparks, cinders, or live coals emitted from one of respondent's passing locomotives and that said locomotive was so negligently constructed and operated as to permit and cause sparks, cinders, or live coals to escape and cause the fire. (R. 5, 8.)

Respondent admitted that the fire occurred and that the wool and sacks were destroyed. Respondent denied that one of its locomotives set the fire and that it was guilty of any negligence. (R. 11, 12.)

The case came on for trial on November 4, 1927 (R. 45-100), and petitioner's evidence showed facts and circumstances sufficient to require the submission to the jury of the question of whether or not one of respondent's locomotives set the fire. The Circuit Court of Appeals reached this conclusion when the case came before it on appeal (R. 118).

Petitioner's evidence also showed: that the country in which the fire occurred was very dry (R. 71); that on the day of the fire the wind was blowing from

the railroad tracks toward the warehouse which the fire destroyed (R. 51); that about fifteen minutes prior to the discovery of the fire one of respondent's trains passed by the warehouse (R. 84, 86), going upgrade (R. 86. 91); that the grade was quite stiff (R. 59) and that the trains generally pull quite hard (R. 59, 91); *that because of the heavy grade the railroad company sometimes divides its trains* (R. 91) *but that the freight train which passed on this occasion consisted of seventy cars and was hauled by two locomotives* (R. 85).

At the conclusion of petitioner's evidence respondent moved for a judgment of nonsuit (R. 100). The court granted the motion (R. 100), to which petitioner duly excepted (R. 104), and thereafter judgment of nonsuit was entered. (R. 16.)

Petitioner duly filed assignments of error (R. 40-42), and then appealed (R. 39-44, 104-109), specifying as errors relied upon that "the court erred in granting the motion for judgment of nonsuit and entering the judgment of nonsuit for the reason that the granting of said motion and the entering of said judgment wrongfully prevented the jury from considering and deciding questions of fact alleged in plaintiff's complaint and testified to by plaintiff's witnesses."

On October 15, 1928, the Circuit Court of Appeals rendered its opinion and affirmed the judgment of nonsuit of the District Court and, upon the same day, its judgment was filed and entered. (R. 120, 121.) In its opinion (R. 114-120) the Circuit Court of Appeals held:

1. That petitioner's evidence was sufficient to warrant the jury finding that one of respondent's locomotives set the fire and therefore was sufficient to call for the submission of this question to the jury. (R. 118.)

2. That petitioner's evidence was not sufficient to raise a *prima facie* presumption that respondent was negligent in setting the fire or to warrant the jury inferring that respondent was negligent in setting the fire. (R. 119, 120.)

Petitioner then filed in this court its petition for a writ of certiorari and at page 4 in said petition, under the heading "Assignments of Error," alleged:

"The Circuit Court of Appeals erred in finding and holding that your petitioner's evidence was not sufficient, to raise a *prima facie* presumption that respondent was negligent or to warrant the jury in inferring that respondent was negligent."

At page 10 of its brief in support of its petition for a writ of certiorari petitioner, under the heading "Specifications of Error," stated:

"The Circuit Court of Appeals erred in affirming the judgment of nonsuit of the District Court, because the question of whether or not the railroad company was guilty of negligence was a question of fact which your petitioner was entitled to have the jury pass upon."

The petition for the writ of certiorari was granted (R. 123) and this case is now before this court on its merits.

SPECIFICATIONS OF ERROR RELIED UPON

1. The District Court erred in granting the motion for judgment of nonsuit and in entering the judgment of nonsuit (See I and II of "Assignments of Error" in Record at pages 40 and 41).

2. The Circuit Court of Appeals erred in affirming the judgment of nonsuit of the District Court. (See "Assignment of Errors" at page 4 in the petition for the writ of certiorari.)

The question of whether or not the railroad company was guilty of negligence was a question of fact which petitioner was entitled to have the jury pass upon and both lower courts erred in depriving petitioner of this right.

THE ARGUMENT—FIRST POINT

Petitioner contends that the evidence discloses facts from which a reasonable person could have justifiably drawn the inference that respondent was negligent.

Respondent sometimes divided its trains, before running them over the stiff upgrade past Badger, in order to avoid the extra laboring caused by the upgrade. Respondent did not divide the freight train that passed Badger fifteen minutes before the fire was discovered. That train was not only undivided but it was a double-header consisting of seventy freight cars. Although the country was dry and conditions were favorable to the igniting of a fire respondent chose to increase the fire hazard rather than to take the precaution which it sometimes took.

The rule of law applicable to petitioner's contention is too well settled to require restatement.

In *McDermott v. Severe*, 202 U. S. 600, at 604, this court said:

"Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence."

In *Maryland Casualty Co. v. Jones*, (June 3, 1929), -------- U. S. ------, 73 L. Ed. ------, this court points out that a motion for a non-suit corresponds

to a motion for a directed verdict and presents the question of whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, is sufficient to sustain a judgment.

The nature of the case at bar is such that the information relating to respondent's negligence or lack of negligence is readily available to respondent and inaccessible to petitioner. For this reason a portion of the opinion in *Catholic University v. Waggaman*, 32 App. D. C. 320, which is quoted with approval in *Terminal Taxicab Co. v. Blum*, 298 Fed. 679, is particularly in point:

"The courts of this country are applying with increasing strictness the rules limiting the right of the trial judge to invade the province of the jury. * * * These narrow restrictions apply where the court has before it the whole case. *Even less latitude is allowed where the jury are peremptorily instructed as the conclusion of the plaintiff's affirmative case that where such an instruction is given when all the evidence of the parties is before the court.*" (Italics supplied).

Petitioner submits that its evidence discloses facts from which a reasonable man could justifiably infer that respondent was negligent.

THE ARGUMENT—SECOND POINT

Petitioner's second and final contention, to which the remainder of this brief will be devoted, is that proof that a railway company set a fire creates a *prima facie* presumption (of fact, not of law), that the railway company was guilty of negligence and thereby raises a question of fact for the jury which may then infer that the railway company was negligent or refuse to draw that inference.

ILLUSTRATIVE CASES

The English case of *Aldridge v. Great W. R. Co.* (1841) 3 Man. & G. 515, 133 Eng. Rep. 1246, is a good illustration of petitioner's point. This was a railway fire case. The property destroyed was adjacent to the railway's tracks. The plaintiff alleged that the fire was caused by the careless management and operation of one of defendant's locomotives. The parties agreed that defendant's locomotives were such as were usually employed on railways and that one of them set the fire complained of and, at the time of the setting of said fire, was being used in the ordinary manner and for the purposes authorized by the act of parliament incorporating the railway company. The agreed statement of facts did not state or show that

such a fire had ever happened before or that sparks had ever previously come from the locomotive.

Upon these facts the case was submitted to the court which was requested to enter judgment of nonsuit or judgment for the plaintiff, according to its opinion. A statute permitted the court to accept and decide a case in which all the facts were agreed upon.

The court held that the facts before it did not permit it to enter either judgment for the plaintiff or judgment of nonsuit. The court held that it could not draw the inference that the defendant was negligent, or find that the defendant was not negligent, without deciding a question of fact, and, therefore, that the case was not of the kind contemplated by the statute relating to agreed cases and would have to go to trial in order that the question of fact might be decided. One of the three judges, all of whom concurred in the decision, remarked that there would probably be a difference of opinion among the judges if they had to decide whether or not the railway company was guilty of negligence.

In the early Alabama case of *Louisville & N. R. Co. v. Reese*, (1889), 85 Ala. 497, 5 So. 283, the court pointed out that "experience has demonstrated that fire rarely escapes in such quantities or volume as to cause damage when the engines are properly con-

structed," equipped, and managed, and, therefore, "when the fire originates from sparks emitted by a locomotive in sufficient quantity or volume to cause damage" a "reasonable inference may arise * * * that the engine was not properly constructed" or equipped, or that it was "not managed with care. When the inference is repelled by proof of the proper construction * * * and * * * management the plaintiff cannot maintain the action without making proof of other negligence or want of care. The extent of the rule is that injury caused by fire escaping from an engine is a circumstance from which the inference of negligence in construction and management of the engine may be reasonably drawn, * * * ".

The force of the inference, or the presumption of fact, is demonstrated by the case of *Fireman's F. I. Co. v. Oregon-Wash. R. & N. Co.* 96 Wash. 113, 164 Pac. 765. In this case there was not a scintilla of evidence to the effect that the locomotive was not properly constructed and equipped, the evidence of both sides agreeing that the spark arresting device used was the best known appliance on the market for the purpose for which it was designed. The court held that the presumption of negligence due to improper construction and equipment was repelled by the evidence, and should not have been submitted to the jury, but that there was no evidence to repell the

presumption that the locomotive was carelessly managed and the question of whether or not the railroad was negligent in failing to *operate* its locomotive with ordinary and reasonable care and skill was properly submitted to the jury.

The Circuit Court of Appeals acknowledged that the law in the State of Washington is in harmony with petitioner's contention (R.119), but it refused to follow the local law as it erroneously construed the federal cases as opposing the Washington rule.

THE FEDERAL CASES

There are a number of federal cases wherein the rule is stated to be that proof that a fire is of railroad origin raises a presumption (of law) of negligence, and shifts the burden of proof so that the defendant railway company must show that it was free from negligence in order to escape liability. There are other federal cases wherein it is denied that this is the rule, but there is no federal case in which the jury, in the absence of any explanation of the fire or showing of the exercising of care on the part of the railway company, was denied the privilege of inferring (from the fact that the fire was of railroad origin) that the defendant railway company was guilty of negligence.

Petitioner does not go so far as to contend that proof that a fire is of railroad origin creates a legal presumption of negligence. Petitioner only contends that such proof creates a *prima facie* presumption (of fact) of negligence which authorizes the drawing of the inference of negligence. If the fire is wholly unexplained the jury may draw the inference that the railway company was negligent, or it may refuse to draw such inference (in which case the plaintiff fails to establish negligence and cannot recover), but, as the English court held in *Aldridge v. Great W. R. Co., supra*, the question of negligence cannot be decided one way or the other without a question of fact being passed upon.

The federal cases which will now be given attention will be found to be in complete accord if every reference to a presumption of negligence in such cases is considered to mean a *prima facie* presumption of fact such as petitioner contends exists and requires that the question of negligence be submitted to the jury. The actual holdings of the federal cases are consistent with this view.

FAVORABLE FEDERAL CASES

The decision of the Circuit Court of Appeals in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Eight Circuit in *McCullen v. Chicago & Northwestern Railway Company* (1900), 101 Fed. 66, upon the same matter. The *McCullen* case is directly in point and in the opinion by Thayer, J., the court said:

"It is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. * * * These reasons have led most courts to hold, —and the doctrine, as we think, should be adhered to,—that proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption that, through a want of proper care on the part of the owner thereof or its employes, the locomotive in question was not provided with a proper spark arrester, or that it was not at the time in a good state of repair, or that its locomotive was carelessly handled."

The *McCullen* case was cited with approval in *Great N. Ry. Co. v. Coats*, 115 Fed. 452 (C. C. A. 8th Circuit), which also arose in South Dakota. In the *Coats* case the evidence established a specific act of negligence, but it is apparent from that portion of the opinion quoted below that Thayer, J., was of the opinion that a presumption of negligence was established by the tracing of the origin of the fire and

did not depend, for its existence, upon the proof of the specific act of negligence. Thayer, J., said:

"The testimony in question not only created a presumption of negligence on the part of the defendant company, but in so far as it showed the company had allowed combustible material to accumulate on its right of way, it established a specific act of negligence, to which the injury complained of might well be attributed."

Missouri Pac. R. Co. v. Texas & P. R. Co. (1888), 33 Fed. 360, and *Missouri Pac. R. Co. vs. Texas & P. R. Co.* (1888), 33 Fed. 361 are almost the same as to the facts. In each case an intervener in a receivership proceeding filed a claim for damage alleged to have been caused by sparks or fire escaping from a locomotive. In each case it was shown that the railway company caused the fire but in neither case was there any evidence of negligence. The master allowed both claims and the receiver, in each case, filed an exception to the master's report. The court overruled the exceptions and held that the proof of the fact that the railway company caused the fire rendered the railway company liable for the damage done thereby in view of the fact that in neither case had the railway company rebutted the presumption of negligence raised against it. These two cases arose in Louisiana. Neither opinion disclosed or referred to any Louisiana statute creating a presumption of negligence and in the later Lousiana case

of *Fuller v. Chicago, R. I. & P. Ry. Co.* (1915), 137 La. 997, 69 So. 804, there is no reference to such a statute although the presumption theory is advanced and followed.

In *Lesser Cotton Co. v. St. Louis I. M. & S. Ry. Co.* (1902), 114 Fed. 133, the case was submitted to the jury, which found for the defendant railway company. The judgment of the District Court was affirmed on appeal. The actual holding of this case is perhaps not in point but parts of the opinion are significant for the reason that they express the views of the Circuit Court of Appeals for the Eight Circuit upon the question of the presumption of negligence.

At page 139 of the opinion it is pointed out that the trial Court charged the jury as follows:

"If you determine that the fire which destroyed the cotton of the Lesser Cotton Company was caused from sparks or cinders communicated from the defendant's engine, then the burden of proof is shifted upon the defendant, and it must overcome the presumption of negligence arising from this finding. It must show that there was no defect in the engine, that there was no negligence in the manner of its operation by its employes, and that they were skillful men. In other words it must prove by a preponderance of the evidence that there was no negligence . * * * "

In commenting upon this instruction the Circuit Court of Appeals, at page 139, said:

"Thus read it will be found to state the established rules of law relative to the subjects under consider-

ation as favorably to the plaintiffs as controlling authorities will warrant. The burden of proof was upon the plaintiffs to establish the casual negligence of the defendant. When they proved, if they did, that the fire was caused by sparks emitted by the defendant's engine, that burden shifted to the defendant, and required it to establish by a fair preponderance of evidence that it had exercised reasonable care to provide the most effective mechanical contrivances in known practical use to prevent the burning of private property by the escape of fire from its engines."

Eddy v. Lafayette, (1892), 49 Fed. 807, arose in Indian Territory. The trial court instructed the jury as follows:

"The court further instructs the jury that evidence showing that the fire originated from sparks from a passing engine is *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence."

The jury found for the plaintiff. The case was then carried to the Circuit Court of Appeals for the Eight Circuit. Seventy-four errors were noted in the assignment of errors and forty of these were relied upon to secure a reversal. In referring to the instructions the Circuit Court of Appeals said:

"It also instructed them, in substance, that the fact that a fire had been occasioned by sparks from a passing engine was *prima facie* evidence of negligence. * * * It is also incumbent on a railway company to show that it has used all those reasonable precautions which the law exacts, when it is proven that adjacent property has been damaged by a fire, which was occasioned by sparks or cinders from a

passing locomotive. The decisions to this effect are both numerous and uniform. Shear & R. Neg. Sec. 676, 678 and citations."

The Circuit Court of Appeals affirmed the judgment of the District Court and the case was then carried to the United States Supreme Court (*Eddy v. Lafayette*, 163 U. S. 456) where it was contended that the instruction quoted above was erroneous and that the Circuit Court of Appeals erred in not correcting the alleged error. The Supreme Court affirmed the judgment of the Circuit Court of Appeals but refused to pass upon the propriety of the instruction. The Supreme Court disposed of this claim of error in the following words:

"It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the Circuit Court of Appeals."

The question of whether or not proof that a fire was ignited by sparks from a locomotive raises a presumption of negligence has been before the courts ever since railways have been operated but the Supreme Court of the United States has never decided this question or come any closer to deciding it than it did in the *Eddy* case.

The *Eddy* case was cited with approval in the *McCullen* case and also in the *Coats* case.

HOSTILE FEDERAL CASES

The cases discussed under this heading are the five cases cited by the Circuit Court of Appeals in support of its decision. This is the only reason they are referred to as hostile for not one of them decides the issue in the case at bar contrary to petitioner's contention. These cases will be considered in the order in which they were decided.

1. *Nitro-Glycerine* case (1872) 15 Wall. 524, 21 L. Ed. 206.

The plaintiff sued the defendants, who composed the well known firm of Wells, Fargo & Co., express carriers, to recover damages for injuries to a building owned by plaintiff and occupied by defendants as plaintiff's tenants. The building was damaged by the explosion of a box of nitro-glycerine while it was in charge of the defendants. The issue was whether or not the defendants were guilty of negligence in the manner in which they handled the box.

The case was tried by court without the intervention of a jury. The manner in which the box was handled was fully explained and the court found that the defendants did not know, or have any means of knowing, what the box contained. The trial court found that there was no negligence on the part of

the defendants and entered judgment in their favor. This decision was affirmed by the United States Supreme Court.

This was not a case in which the plaintiff was nonsuited without being given the opportunity to have a judicial determination of the care exercised by the party causing the damage and in possession of all the information relating to the happening of the accident. The accident was fully explained and the court found as a fact that there was no negligence on the part of the defendants. Petitioner does not regard this case as hostile to its contention as petitioner does not contend that proof of the setting of a fire by a railway company is conclusive evidence of negligence. Petitioner concedes that the *prima facie* presumption of fact which such proof raises may be overcome by evidence of due care and lack of negligence. Petitioner only contends that such proof, in the absence of any explanation, raises an issue of fact for the jury. In the *Nitro-Glycerine* case there was no jury. The trial court could not decide the case one way or the other without deciding that there either was, or was not, negligence. In passing upon this question it was obliged to decide, and did decide, a question of fact. *Aldridge v. Great W. R. C., supra.*

The opinion in the *Nitro-Glycerine* case was written by Field, J., who said:

"The gist of the action is the negligence of the defendants. Unless that be established they are not liable. The mere fact that injury has been caused is not sufficient to hold them. * * * A party charging negligence as a ground of action must prove it."

Petitioner has no objection to this statement. It has always been held that the mere fact that someone has been injured does not make out a case. It is the proof of the fact of the accident (not the injury) that creates a *prima facie* presumption of fact as to negligence if the nature of the accident is such that it would not be likely to happen in the absence of negligence. This legal difference between proving the fact of the injury and the fact of the accident is clearly pointed out in *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.* (1905), 139 Fed. 528, (at 533) which is one of the cases relied upon by the Circuit Court of Appeals in the case at bar.

There is a large class of cases in which proof that the defendant caused the accident resulting in injury warrants the drawing of the inference of negligence in the absence of any explanation or showing of due care by the defendant. Railway fire cases come within this class. In such cases proof that the defendant caused the accident together with the inference of negligence draw therefrom, if such inference

is drawn, (the jury is not required to draw such inference but may or may not draw it), establishes negligence and warrants a recovery by the plaintiff.

In saying that the party charging negligence must prove it Justice Field did not intend to convey the impression that in a railway fire case the plaintiff could not establish negligence by (1) showing that the defendant caused the fire and (2) inducing the jury to draw the inference, from that fact, that said fire was caused by negligence. Justice Field could not have intended to be so understood because, long before the decision of the *Nitro-Glycerine* case, he concurred in an opinion of the Supreme Court of California which held to the contrary.

The case referred to is *Hull v. Sacramento Valley Railroad Co.* (1859), 14 Cal. 388, wherein the evidence showed no specific act of negligence. The court held that the case was one for the jury on the theory that proof of the fact that the fire was caused by one of the defendant's locomotives, along with proof that this result would not be probable from the ordinary working of the engine, was sufficient to make out a *prima facie* case of negligence and require the submission of the case to the jury. The jury found for the plaintiff and the court held that it could not review the jury's finding upon this question of fact.

This case was decided in 1859. Perhaps it was then the law that the plaintiff, in order to raise the presumption of negligence, had to show, in addition to the fact of the fire, that the setting of a fire was not probable from the ordinary working of the locomotive. This is no longer the law, if it ever was, as it is now a matter of common knowledge that the ordinary laboring of a locomotive is not likely to cause a fire. In *Louisville L. N. R. Co. v. Reese*, (1889), 85 Ala. 497, 5 So. 283, the court said:

"Experience has demonstrated that fire rarely escapes in such quantities or volume as to cause damage, when the engines are properly constructed, are supplied with the most approved appliances for preventing the escape of fire, and are managed with care."

Petitioner submits that the *Nitro-Glycerine* case is not injurious to its position.

2. The second of the cases cited by the Circuit Court of Appeals in support of its decision is *Garrett v. Southern Ry. Co.* (1900), 101 Fed. 102. The opinion was written by the present Chief Justice of the United States. Taft, J., said:

"The sole question presented for our consideration is whether the rule which the court laid down as to the burden of proof was correct. * * * The court below, in effect, instructed the jury * * * that if the jury found as a fact that under the present approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence, *then the*

jury would be justified in inferring as a fact, from the mere circumstance of the fire and its origin in the emission of sparks, that the fire was caused by the negligence of the defendant. The court declined to charge the jury, *as a matter of law*, that mere proof that the fire was caused by sparks from an engine was *prima facie* evidence of the negligence of the defendant." (Italics supplied).

Petitioner has never contended, and does not now contend, that proof that a fire was caused by sparks from a locomotive created a *presumption of law* that there is negligence on the part of the railway company. Petitioner only contends that such proof creates a *prima facie* presumption *of fact* warranting, but not requiring, the drawing of the inference that there was negligence. The trial court, in the *Garrett* case, expressly informed the jury that it could draw this inference if it chose to do so and Taft, J., in the last paragraph of the opinion, said:

"The jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could *as a matter of fact*, that it was caused by negligence; but the court declined to charge them, *as a matter of law*, that it raised a presumption of negligence. The course of the court, we think, was well within the rule, as we understand the cases, which the Supreme Court of the United States has followed. (Italics supplied).

This states petitioner's position very clearly and is in full accord with petitioner's contention. Petitioner's only present request is that the Supreme

Court of the United States adhere to the view expressed by its present Chief Justice when he wrote the opinion in the *Garrett* case.

The *Garrett* case refers to the *Nitro-Glycerine* case which requires no further discussion.

3. The third case cited by the Circuit Court of Appeals in support of its decision is *Cincinnati N. O. & T. P. R. Co. v. South Fork Coal Co.* (1905), 139 Fed. 528. Two of defendant's freight trains collided and wrecked. The collision started a fire which spread to and destroyed plaintiff's lumber. The issue was whether or not the collision was caused by negligence. The defendant's contention, on appeal, was that there was no evidence from which negligence could be inferred. The Circuit Court of Appeals held that the fact of the collision warranted the drawing of the inference of negligence and justified the trial court's refusal to direct a verdict. The trial court submitted the case to the jury which found for the plaintiff.

In the opinion, which was delivered by Lurton, J., the court, in referring to cases wherein a fire is shown to have been caused by sparks escaping from a locomotive, said:

"At the common law a *prima facie* case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use

of such engine being sanctioned by statute there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. The ground of the action being, therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks *in view of the fact that some sparks will escape despite the use of appliances to arrest them.*" (Italics supplied).

Inasmuch as the issue was whether or not the collison was caused by negligence this reference to the law relating to fires caused by escaped sparks was dictum. The court held that a collision, unexplained, created a *prima facie* presumption of fact of negligence. Why, then, should not a fire caused by the escape of sparks, unexplained, do likewise? (A collision could occur, without negligence, as readily as a fire caused by sparks could occur without negligence). To hold that it does not do so "because some sparks will escape despite the use of appliances to arrest them" is to hold that a *prima facie* presumption of fact cannot be raised except when the nature of the accident is such as to preclude the possibility of a non-negligent cause. To insist that the accident must be of such a nature as to preclude the possibility of a non-negligent cause would be to destroy all *prima facie* presumptions of fact since, on that hypothesis, the happening of the accident would furnish conclusive evidence of negligence. (See note in L. R. A. 1917 E. page 43).

The Court's inadvertent dictum which is quoted above is illogical and in conflict with the decision in the very case in which it appears. It is submitted that this dictum in no way weakens petitioner's contention. The case in which it is contained recognizes the propriety of drawing the inference of fact of negligence from the unexplained happening of an accident not likely to occur without negligence and in this supports the general proposition for which petitioner contends.

4. *Toledo, St. Louis & W. R. R. Co. v. Starr Flouring Mills Co.* (1906), 146 Fed. 953, is the fourth case cited by the Circuit Court of Appeals in support of its decision. The case arose in Ohio under a statute making the ignition of a fire by sparks from a locomotive *prima facie* proof of negligence. The case went to the jury, which found for the plaintiff, and on the appeal the issue was whether or not the trial court erred in instructing the jury that the defendant could escape liability only by proving, by a preponderance of the evidence, that its engine was equipped with the best and most effective spark arrester and that it was in good condition and operated by competent and skillful men. The court held that the instruction was erroneous because the Ohio statute did not shift the burden of proof.

The opinion was written by Lurton, J. It admitted that proof that the railway company set the fire required the submission of the case to the jury and dealt with the question of the force of the statutory presumption.

The opinion of the Circuit Court of Appeals in the case at bar stated that this case affirmed the Garret case. It affirmed the *Garrett* case's holding that no legal presumption of negligence was created but it did not decide any proposition of law contrary to petitioner's contention or affirm any ruling in the *Garrett* case which did this. The manner in which this case and the *Garrett* case is referred to in the opinion of the Circuit Court of Appeals indicates that that court did not correctly understand petitioner's contention or the law as established by the federal cases. The issue in this case does not concern where the burden of proof lies after a case for the jury has been made out, but, rather, whether the proof that the fire is of railroad origin creates a *prima facie* presumption of fact requiring the case to be submitted to the jury. The Circuit Court of Appeals evidently mistakenly thought that petitioner contended that such proof created a legal presumption of negligence and that petitioner had to establish this proposition in order to be entitled to reversal.

5. The fifth and last case cited by the Circuit Court of Appeals in support of its decision is *Louisville & N. R. Co. v. Bell*, (1913), 206 Fed. 395. This case arose in Tennessee where there was no statute relating to the setting of fires. The trial court denied a motion for a directed verdict and submitted the case to the jury, which found for the plaintiff. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court. It found that the evidence contained proof tending to show that the railway company's locomotive was negligently operated and (at page 399) pointed out that it specifically refused to pass upon the question of whether or not a case sufficient for the jury would have been made out had such evidence been lacking.

In not one of the cases cited in the opinion of the Circuit Court of Appeals, in the case at bar, was there a judgment of nonsuit or a directed verdict. Every case (save the *Nitro-Glycerine* case which was tried by the Court) went to the jury. Petitioner has not found, and hereby challenges the respondent to produce, a single federal case in which the origin of the fire has been proved, where the plaintiff, in the absence of any showing of care by the railway company, has been denied the privilege of having the jury draw the inference that the railway company was guilty of negligence.

It is submitted that the rule in the Federal Courts is clearly in petitioner's favor.

RULE IN WASHINGTON

The rule in the State of Washington is in full accord with petitioner's contention as is demonstrated by three cases which will now be given attention.

1. In *Thorgrimson v. Northern Pac. Ry. Co.*, (1911), 64 Wash. 500, the court said:

"The rule putting the burden on the railway company to explain the cause of a fire following a passing engine, to which this court is probably committed (Overacker v. Northern Pac. R. Co., ante p. 491, 117 Pac. 403), and which counsel relied on to carry the case to the jury on the questions of equipment and operation, is one of necessity, and is applied so that justice may not be defeated. * * * It is the proof of setting the fire * * * that raises the inference of negligence * * *."

2. In *Northwestern Mut. Fire Ass'n v. Northern Pac. Ry. Co.* (1912), 68 Wash. 292, the court said:

"In a foot note to the case of *Atchison etc., R. Co. v. Geiser*, 1 Am. & Eng. Ann. Cases, the annotator, at page 815, says:

" 'In England and in many of the states of the Union, it is held that the mere fact of communication of fire by a railroad engine is, of itself, sufficient to raise a presumption of negligence against the railroad company, or in other words, that proof of such communication is sufficient to make out a *prima facie* case of negligence against the defendant in an action for injuries caused by the fire.'

"After supporting this statement by citing numerous cases, the annotator, at page 816, further says:

" 'In some jurisdictions this doctrine is the result of express legislative enactment, or is, at least, sanctioned by statute. Such, as will appear from the decisions above cited from those states, is the case in Arkansas, Illinois, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, New Jersey, North Dakota, Ohio, Utah, and Vermont. But in many, if not all, of the other states from which decisions are cited above, the rule has been adopted irrespective of statute; and in a number of cases it has been expressly stated that the principle is one of the common law, and not dependent upon legislative enactment.'

"This statement, which is in harmony with our own decisions, is also supported by additional citations of authority from North Carolina, South Dakota, and Tennessee."

3. *Fireman's F. I. Co. v. Oregon-Wash. R. & N. Co.* (1917), 96 Wash. 113, is in harmony with the two preceding cases. It has been discussed already on page 11, of this brief.

In the case at bar the Circuit Court of Appeals acknowledged that the local law is in petitioner's favor (R. 119).

GREAT WEIGHT OF AUTHORITY FAVORABLE

The Circuit Court of Appeals decided an important question of general law in a way probably untenable and definitely in conflict with the great weight of authority.

The cases upon the issue at bar are legion and no useful purpose would be accomplished by discussing them in this brief. An appendix which lists the statutes and cases showing the status of the law in forty-four of the forty-eight states has been compiled and attached to this brief. Its author has been unable to discover the status of the law in the other four states which are Arizona, New Mexico, Rhode Island and Wyoming. In citing statutes in the appendix, codes and other compilations have been cited only when access to original sources could not be had.

A majority of the states have deemed it beneficial to the public welfare to settle the issue in the case at bar by legislative enactment. The statutes which these states have passed fall into two general classes:

(1) Those imposing absolute liability upon railways, irrespective of negligence, for fires set by them.

(2) Those which make proof that the railway company set the fire *prima facie* evidence of negligence.

Under a statute of either class proof that a railway locomotive set a fire is sufficient to carry the case to the jury. The twenty-six states listed in Table A in the appendix have statutes of the kind here referred to and in many of those states the law was the same, by judicial decision, before the legislature took action in the matter.

In the fourteen states listed in Table B in the appendix it is held, in the absence of statute, that proof that a railway locomotive emitted sparks which ignited a fire makes a *prima facie* case for the jury.

In only four states, those listed in Table C of the appendix, it is held, in the absence of statute, that a question for the jury is not raised by proof that a railway locomotive emitted sparks which ignited a fire.

RULE IN ENGLAND

There has never been any serious dispute as to the truth of the often repeated statement that in England proof that a fire has been caused by sparks emitted from a locomotive makes out a *prima facie* case of negligence requiring the case to be submitted to the jury.

Aldridge v. Great W. R. Co. (1841), 3 Man. & G. 515, 133 Eng. Rep. 1246, is directly in point. This

case has already been discussed on page 9 of this brief.

Pigott v. Eastern Counties R. Co. (1846), 3 C. B. 329, 136 Eng. Rep. 92, also supports petitioner's contention. In the opinion Tindall, C. J., said:

"The evidence in this case is abundantly sufficient to show that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendant's engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think that the jury came to a right conclusion, in finding that the company was guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance * * *."

Maule, J., referring to the fire, said:

"I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence in the absence of evidence to shew that something had been done by the company to lessen the chances of danger. It appeared that no steps of that sort had been taken, * * *. Upon the whole I think the verdict would have been wrong if it had been the other way."

This case is referred to with approval in *Hull v. Sacramento Valley R. Co., supra,* in which Justice Field concurred.

It should be borne in mind that in the case at bar, because a nonsuit was granted at the conclusion of

petitioner's evidence, there was no evidence whatsoever of any precaution adopted by the railway company. As far as the evidence in the record is concerned, it does not appear whether respondent's locomotive used a spark arrester or did not use a spark arrester.

RES IPSA LOQUITUR APPLIES

The cases relative to the issue at bar have been examined and discussed and the holdings and the principles upon which they are based so strongly suggest that the maxim *res ipsa loquitur* is applicable to railway fire cases, and has been applied to such cases, that petitioner is of the opinion that this brief would be incomplete if it did not give this matter at least brief consideration.

The meaning of *res ipsa loquitur* is clearly stated by this court in the leading case of *Sweeney v. Erving* (1913), 228 U. S. 233, wherein this court said:

"The general rule in actions for negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the

thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference which arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence."

Are railway fire cases in that class of exceptional cases to which the maxim is applicable? The language of Justice Holmes in *Graham v. Badger* (1895), 164 Mass. 42, 41 N. E. 61, is instructive upon this point:

"*Res ipsa loquitur*—which is merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of the particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence."

Thus, it appears, the proposition is reduced to this: If jurymen are warranted in believing, from their experiences as men of the world, that railway fires do not commonly happen except in consequence of negligence then the maxim is applicable to railway fire cases.

May jurymen justifiably entertain the view that railway fires do not commonly happen except in conse-

quence of negligence? In view of what courts have said in regard to this matter this question, it is submitted, can be answered only in the affirmative.

In *Dyer v. Maine Central Ry. Co.* (1904), 99 Me. 195, 58 Atl. 994, 67 L. R. A. 416, the court said:

"We may presume that the defendant is not running locomotives over its road, the natural and probable effect of which would be to communicate fire to the property along its route if the locomotives were properly equipped and carefully managed, and when fire is so communicated the natural presumption is that it is due to negligence."

In *L. & N. Ry. Co. v. Reese* (1889), *supra*, the court said:

"Though no mechanical contrivance has been invented, or is in use, which can effectually prevent the escape of fire from locomotives at all times and under all circumstances, from which injury may result, experience has demonstrated that fire rarely escapes in such quantities or volume as to cause damage, when the engines are properly constructed, are supplied with the most approved appliances for preventing the escape of fire, and are managed with care."

In *Ellis v. P. & R. R. Co.* (1839), 24 N. C. 138, 2 Iredell 112, Gaston, J., said:

"We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendants, but we hold, that when he shows damage resulting from their act, which act, with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless."

The *Ellis* case was referred to with approval in *Hull v. Sacramento Valley R. Co., supra,* in which Justice Field concurred.

In the *Garrett* case, *supra,* "the jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could as a matter of fact, that it (the fire) was caused by negligence." In approving the granting of this permission, Chief Justice Taft, who wrote the opinion when upon the Circuit Court of Appeals, said:

"The course of the court, we think, was well within the rule, as we understand the cases, which the Supreme Court of the United States has followed."

Unless this court is of the opinion that the cause of railway fires is ordinarily non-negligent and that such fires are not commonly due to negligence, then, in accordance with the view expressed in the last sentence quoted above from the opinion of Justice Holmes, the maxim *res ipsa loquitur* must be held to be applicable.

Petitioner submits that on principle the conclusion that the maxim is applicable to railway fire cases is inescapable. The courts of the country have been tacitly applying it to such cases for nearly a century. The mere recalling of the holdings of a large number of the cases cited in this brief will demonstrate the truth of this fact.

Not all of the courts, however, have failed to point out that their decisions, in railway fire cases, were based upon the application of the maxim.

Southern Ry. Co. v. Dickens (1909), 161 Ala. 141, 49 So. 766, was a railway fire case in which the facts were very similar to the facts in the case at bar. The court held that the plaintiff had made out a case for the jury and said:

"It has been held by the courts which decided that such evidence makes out a *prima facie* case of negligence, that * * * when it appears that the fire which caused the injury was ignited by sparks or other fire emitted from the locomotive, if not strictly so, it may be likened unto a case of *res ipsa loquitur*."

Williams v. Camp Mfg. Co. (1919), 177 N. C. 512, 99 S. E. 370, is squarely in point. The court quoted from *Sweeney v. Erving*, *supra*, and then, referring to the doctrine of *res ipsa loquitur*, said:

"The casting of sparks from a locomotive engine upon another's land, and burning the timber on it, is a striking illustration of this doctrine, and the rule we have mentioned applies strictly to such a case. There are many cases decided by this court in which it has been applied." (Abundant authority cited.)

Page v. Camp Mfg. Co. (1920), 180 N. C. 330, 104 S. E. 667, likewise recognizes the applicability of the maxim.

Cincinnati N. O. & T. P. R. Co. v. South Fork Coal Co. (1905), 139 Fed. 528, has already been discussed

on pages 25-27 of this brief. This issue was whether or not a collision occurring between two trains, from which a fire resulted, was caused by negligence. In the opinion the court discussed the maxim *res ipsa loquitur* and held that it was applicable. The opinion cited cases of injuries caused by falling objects wherein the maxim was applied.

By way of dictum the court expressed its opinion that the same principles did not apply to railway fires caused by sparks escaping because (it said) sparks could escape without the railway company being negligent. (The court probably overlooked the fact that a collision could occur in the absence of negligence.) The learned author of the note found on page 43 of L. R. A. 1917 E conclusively shows the fallacy in the reasoning which lead the court to make its inadvertent statement with reference to fires caused by sparks. His annotation, in part, reads as follows:

"The possibility that the accident in question may have happened without negligence on the part of the defendant does not necessarily defeat the application of the rule of *res ipsa loquitur*. The probability that the accident was due to negligence must, of course, outweigh the probability of a non-negligent cause; but to insist that the accident must be of such a character as absolutely to negative the possibility of a non-negligent cause, would be to destroy all scope for the doctrine, since, on that hypothesis, the happening of the accident would furnish conclusive evidence of negligence."

The text writers have long since recognized the applicability of the maxim to railway fires. 29 Cyc. 595; II Thompson's Commentaries on the Law of Negligence, Sec. 2285. The author of the text last cited, in Vol. II, Sec. 2287, bemoans the fact that some of the courts failed to appreciate the applicability of the maxim to such cases. He states:

"The principles which should have been applied by the judges at the outset, the failure to comply with which has been productive of a long train of injustice against agricultural communities, which the legislatures have been obliged to step in and remedy, is that the mere fact of ignition, when it is shown to have preceded from the locomotive, is *prima facie* evidence of negligence *under the principle of res ipsa loquitur.* There was every reason, founded in a sound public policy, in applying this principle to this subject." (Italics supplied.)

The application of the maxim to railway fire cases would not be unjust to the railway companies because, as this court pointed out in *Sweeney v. Erving, supra*:

"The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect * * * attributable to defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury, even in the absence of any additional evidence."

It is not necessary to the application of the maxim that a contractual obligation exist between the plaintiff and the defendant for the rule of the maxim originates from the nature of the act and not the relations between the parties. *Rose v. Stephens & Condit Transp. Co.* (1882), 11 Fed. 438; 29 Cyc. 591.

The maxim has been applied to a wide variety of cases including cases of explosions, landslides, and passengers on railway trains. It has often been applied to cases wherein someone is injured by being struck by a falling object. Stevedore injured by the fall of a stanchion, *The William Branfoot*, 52 Fed. 390; brick falling out of pier on railway bridge upon person passing on highway underneath, *Kearney v. London & Ry.*, L. R. 6 Q. B. 759; pedestrian on public street injured by fall of barrel of flour from a window above shop adjoining street, *Byrne v. Boadle*, 2 Hurt. & Culb. 721, 726; customs collector passing in front of warehouse in dock struck by fall of bags of sugar which were being lowered from above, *Scott v. The London Docks Co.*, 3 Hurl. & Colt, 596, 600.

By reason of the fact that the use of airplanes is now increasing rapidly there will undoubtedly soon be cases of injuries being caused by the negligent dropping of objects. This court, it is submitted, should be slow to adopt a rule which will, in effect, leave the injured person without a remedy.

Petitioner submits that the maxim *res ipsa loquitur* is applicable to railway fire cases, has been often applied in such cases, and is the rule most consistent with the welfare of the general public.

CONCLUSION

Petitioner contends:

1. That the evidence in the case at bar was such that the jury, if permitted to do so, might have reasonably drawn the inference that respondent was negligent in failing to divide its train, as it sometimes did, and in running a seventy-car double-header freight train over the upgrade past Badger, under the conditions existing at the time it did so.

2. That the establishing, by sufficient evidence, that respondent caused the fire in question raised a question of fact for the jury—the question of respondent's negligence—which the court should have submitted to the jury. Petitioner contends that the decision of the Circuit Court of Appeals upon this point is in direct conflict with the rule in the State of Washington and the rule in the federal courts and that the holding is untenable and contrary to the weight of authority both in the United States and in England.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals should be reversed.

JAMES B. HOWE,
DONALD G. GRAHAM,
JAMES B. HOWE, JR.,
Counsel for Petitioner.

APPENDIX

TABLE A

The states here listed have statutes (cited below) which either impose absolute liability on railroads for fires set by them, irrespective of negligence, or make the fact of the fire *prima facie* evidence of negligence.

1. Arkansas, Act Apr. 2nd, 1907, Laws of 1907, p. 336.
2. Colorado, Session Laws 1887, p. 368.
3. Connecticut, Gen. Stat. 1919, Sec. 5739.
4. Florida, Gen. Stat, 1906, Sec. 3148.
5. Georgia, Code 1873, Sec. 3033.
6. Illinois, Starr. & C. Stat. Ill. 1885, p. 1949, Sec. 104.
7. Indiana, Burns Ann. Stat. 1914, Sec. 5525a.
8. Iowa, Code 1897, Sec. 1289.
9. Kansas, Gen. Stat., par. 1321, and Stat. 1901, Sec. 5923.
10. Kentucky, Ken. Stat. 1903, Sec. 782 (see case 97 So. 727).
11. Maine, Rev. Stat. Ch. 51, Sec. 64.
12. Maryland, Code, Art. 77, Sec. 1.
13. Massachusetts, Gen. Laws Mass. 1921, Ch. 160, Sec. 234.
14. Michigan, How. Stat., Sec. 3378.
15. Minnesota, Gen. Stat. 1878, Ch. 34, Sec. 60.
16. Mississippi, Code, Sec. 1059.
17. Missouri, Rev. Stat. 1889, Sec. 2615.
18. New Hampshire, Pub. Stat., Ch. 159, Sec. 29.
19. New Jersey, Rev. Stat. 911, Sec. 16.
20. North Dakota, Comp. Stat. 1913, Sec. 4654.
21. Ohio, Page Ohio Code, Secs. 69, 70, 71, 72.
22. Oklahoma, Comp. Stat. Okla. 1921, Sec. 3851.
23. South Carolina, S. C. Civ. Code 1902, Sec. 2135.
24. South Dakota, Rev. Code S. D. 1919, Sec. 9705.
25. Utah, Comp. Laws 1876, Ch. 217, Sec. 503.
26. Vermont, Rev. Laws 1880, Sec. 3444.

TABLE B

In the states listed below, where the subject is not determined by statute, the holding is that proof that the railroad company set the fire makes out a *prima facie* case of negligence.

1. Alabama, Southern Ry. Co. v. Johnson (1905), 141 Ala. 575, 37 So. 919; Southern Ry Co. v. Dickens (1909), 161 Ala. 141, 49 So. 766.
2. California, Hull v. Sacramento Valley Ry. Co. (1859), 14 Cal. 388.
3. Idaho, Fodey v. N. P. Ry. Co. (1912), 21 Idaho 713, 123 Pac. 835; Osburn v. Oregon R. & N. Co. (1908), 15 Idaho 478, 98 Pac. 627, 19 L. R. A. N. S. 742, 16 Ann. Cas. 879.
4. Louisiana, Fuller v. Chicago Ry. Co. (1914), 137 La. 997, 69 So. 804.
5. Montana, Missoula Trust Co. v. N. P. Ry. Co. (1926), 76 Mont. 201, 245 Pac. 949.
6. Nebraska, Shipman v. Chicago, etc., Ry. Co. (1907), 78 Neb. 43, 110 N. W. 535; Westing v. Chicago B. & Q. Co. (1910), 87 Neb. 655, 127 N. W. 1076.
7. North Carolina, Page v. Camp Mfg. Co. (1920), 180 N. C. 330, 104 S. E. 667; Williams v. Camp Mfg. Co. (1919), 177 N. C. 512, 99 S. E. 370.
8. Oregon, Chenoweth v. So. Pac. Ry. Co. (1909), 53 Ore. 111, 99 Pac. 86.
9. Tennessee, Burk v. Railroad Co., 7 Heisk 451; Simpson v. Railroad Co., 5 Lea 456.
10. Texas, St. Louis Ry. Co. v. Eccles (1909), 53 Tex. Civ. App. 218, 115 S. W. 648; Chicago Ry. v. Meyers (1926), 285 S. W. 1058.
11. Virginia, Phillips v. So. Ry. Co. (1909), 109 Va. 436, 63 S. E. 998.
12. Washington. (See the 3 cases cited in brief.)

13. West Virginia, Wilson v. Bush (1911), 70 W. Va. 26, 73 S. E. 59.
14. Wisconsin, Bonnell v. Chicago Ry. Co. (1915), 158 Wis. 153, 147 N. W. 1046; Spaulding v. C. & N. W. Ry. (1873), 33 Wis. 582.

TABLE C

In the states listed below, where the subject is not determined by statute, the holding is that proof that the railroad company set the fire does not make out a *prima facie* case of negligence:

1. Delaware, Director Gen. of Rys. v. Johnson (1926), 133 Atl. 158; Jefferis v. Railroad Co. (1886), 3 Houst. 447 (Superior Ct.).
2. Nevada, Longbaugh v. Virginia City Railway (1874), 9 Nev. 295.*
3. New York, Case v. N. Cent. Ry. Co. (1871), 59 Barb. 644; McCaig v. Erie Ry. Co. (1876), 59 Barb. 646; Peck v. N. Y. Cent. Ry. Co. (1901), 165 N. Y. 347, 259 N. E. 206.
4. Pennsylvania, Taylor v. Penn. Valley Ry. Co. (1909), 174 Pa. St. 171; Jennings v. Penn. Ry. Co. (1880), 93 Pa. St. 337.

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*The question has never been squarely presented in Nevada.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 23

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Respondent.

Reply Brief of Petitioner on Merits

JAMES B. HOWE
DONALD G. GRAHAM
JAMES B. HOWE, JR.
Counsel for Petitioner
856 Stuart Building, Seattle, Washington

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THE NEGLIGENCE ISSUE

Respondent's brief gives considerable attention to the *Nitro-Glycerine Case*, 15 Wall. 524, 21 L. ed. 206, but respondent's comments do not require any answer

because petitioner's opening brief, pages 19-23, demonstrated that this case is not in point.

Respondent's brief concludes by stating:

"Plaintiff (petitioner) is asking the court to reverse a rule that has been in effect in this court and in Federal Courts generally, at least since the decision in the *Nitro-Glycerine case, supra,* more than fifty years ago."

This gratuitous conclusion is not supported by any authority. On page 29 of its opening brief petitioner said:

"Petitioner has not found, and hereby challenges the respondent to produce, a single federal case in which the origin of the fire has been proved, where the plaintiff, in the absence of any showing of care by the railway company, has been denied the privilege of having the jury draw the inference that the railway company was guilty of negligence."

Respondent has not met the challenge or attempted to do so and upon the point under discussion has cited only four cases not dealt with in petitioner's opening brief. These four cases are:

New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367.

Patton v. Texas & Pac. Ry. Co., 179 U. S. 658.

Northern Pacific Ry. Co. v. Mentzer, 214 Fed. 10, 22.

Woodard v. Chicago M. & St. P. Ry. Co., 145 Fed. 577.

The two cases decided by this court were cases wherein railway company employes were attempting to recover from their employers for personal injuries. In each case the defendant made an explanation. Neither case concerned a fire and neither case is in point.

There is nothing in the holding of *Northern Pacific Ry. Co. v. Mentzer* hostile to petitioner's contention. This case merely holds that it is incumbent upon the plaintiff to establish negligence. Petitioner and respondent are in accord upon this but differ in their contentions as to how negligence may be established. In this case the defendant made an explanation. The jury found for the plaintiff and the judgment entered upon its verdict was affirmed upon appeal.

In *Woodard v. Chicago M. & St. P. Ry. Co.* the defendant railway company introduced evidence and made such a strong and satisfactory showing of due care that the court held that the statutory presumption of negligence had been overcome and directed a verdict in the defendant's favor. Petitioner has never contended that the presumption of negligence raised by proof of the setting of the fire is conclusive. Petitioner has always stated that such presumption is only *prima facia* and conceded that it could be overcome by sufficient evidence of due care. This case, like the

Nitro-Glycerine case, is not in point because in each case the defendant made an explanation and a sufficiently strong explanation to overcome any *prima facia* presumption of negligence.

The only portion of the opinion in *Cincinnati N. O. & T. R. R. Co. v. South Fork Coal Co.*, 139 Fed. 528, which aids respondent or supports the proposition for which it was cited (by the Circuit Court of Appeals in the case at bar) is *dictum*. Respondent concedes this, at page 16 of its brief, but suggests that the *dictum* is correct because "sparks escape from locomotives in the normal and customary operation of railroads." Sparks do escape in the normal and customary operation of railroads *but they seldom escape in such quantities or volume as to cause damage in the absence of negligence.* The italicized portion of this statement is supported by the cases cited on page 37 of petitioner's opening brief. Respondent's brief does not mention those cases, or the doctrine of *res ipsa loquitur*, and does not allude to quotation from page 43 of L. R. A. 1917 E (see page 40 of petitioner's opening brief) which emasculates the contention that a *prima facie* presumption of negligence can not exist unless the accident in question is of such a nature that it negatives the possibility of a non-negligent cause.

In the case at bar the Circuit Court of Appeals relied chiefly upon *Garrett v. Southern Ry. Co.*, 101 Fed. 102. Petitioner's opening brief (pages 23, 24 and 28) endeavored to show that this case did not support the court's holding. Respondent's brief (page 15) states that in the *Garrett* case "evidence to show negligence was introduced, and it was only because it was introduced, that the case went to the jury." Counsel for petitioner have read and re-read the opinion in the *Garrett* case and have failed to find any reference to any act of negligence proved by the plaintiff.

Respondent points out that the opinion, in the Garrett case, said:

"It may be that evidence as to approved methods for preventing emission of dangerous sparks may justify an inference of fact that the fire could not have been thus communicated without negligence. This was the charge of the court."

Grasping at a straw, respondent suggests that because of this language it is essential to introduce evidence that a fire is not likely to occur without negligence. Does respondent wish a plaintiff to prove what is a matter of common knowledge? If so, why did not respondent criticize, or produce authority contrary to, the cases quoted from on page 37 of petitioner's brief, to-wit, the cases holding that such proof is unnecessary?

Respondent's brief quotes from *Louisville & Nashville R. R. Co. v. Bell*, 206 Fed. 395, in spite of the fact that petitioner's brief (page 29) pointed out that the court found that there was evidence tending to show that the railway company's locomotive was negligently operated and specifically refused to pass upon the question of whether or not a case sufficient for the jury would have been made out had such evidence been lacking.

Respondent contends that *McCullen v. Chicago & North Western Ry. Co.*, 101 Fed. 66, is not in point upon the question of the presumption of negligence because, respondent says, in that case there was evidence of negligence. Thayer, J., who delivered the opinion, based the holding squarely upon the rule that proof of the origin of the fire created a presumption of negligence. The learned judge did not even hint that he thought the plaintiff had proved a specific act of negligence (the evidence showed no act of negligence) and in the later case of *Great Northern Railway Company v. Coats*, 115 Fed. 452, Thayer, J., showed that he entertained the view that proof of a specific act of negligence was unnecessary, when he said:

"The testimony in question not only created a presumption of negligence on the part of the defendant company, but in so far as it showed the company had allowed combustible material to accumulate on its

right-of-way, it established a specific act of negligence."

In the *McCullen* case the mill destroyed by fire was 302 feet distant from the tracks over which the locomotive alleged to have caused the fire passed. Respondent's argument that negligence was shown in the McCullen case is scarcely consistent with respondent's argument, in the case at bar, that there was no evidence from which the jury could infer that respondent's locomotive set fire to the warehouse only a few feet away from the railway tracks.

Respondent's brief does not mention *Hull v. Sacramento Valley Railroad Co.*, 14 Cal. 388, (page 22 of petitioner's opening brief) which is favorable to petitioner's contention and in which Field, J., concurred. Respondent's brief does not mention any of the six federal cases (except the *McCullen* case) discussed under the heading "Favorable Federal Cases" on pages 14 to 18 of petitioner's opening brief. Respondent's brief quoted from the opinion of the District Court and the Circuit Court of Appeals *in the case at bar* but did not respond to petitioner's challenge to produce a single federal case of like holding. Respondent still asserts that it relies upon the federal court rule but petitioner has been unable to find, or induce respondent to produce, any federal case showing the rule to be what respondent contends it is.

Respondent admits (brief page 19) that the rule in the State of Washington is in accord with petitioner's contention. Respondent did not challenge petitioner's statement that the rule in England is the same or petitioner's abundant citations showing that the great weight of authority supports petitioner's view. Respondent's brief ignores the maxim *res ipsa loquitus*. Respondent does not openly admit abandoning the support of the legal proposition announced by the Circuit Court of Appeals but respondent shifts its position and invites this court to read all the evidence in the case and decide that the Circuit Court of Appeals was wrong in holding that the evidence was sufficient to go to the jury upon the question of whether or not the railway company set the fire.

Locomotive Set Fire

Petitioner believes this court will not deem it necessary to review the correctness of the holding of the Circuit Court of Appeals that the evidence was sufficient to warrant the drawing of the inference that sparks from respondent's locomotive caused the fire. Although there is room for a difference of opinion as to how the fire was caused it certainly can not be said that petitioner's evidence is insufficient to warrant the drawing of the inference that respondent's locomotive caused the fire.

In case it should decide to review the evidence this court should not be misled by the statements in respondent's brief that there was no grade at Badger. The record shows that there was a stiff grade (R. pages 59, 86, and 91). The Circuit Court of Appeals so interpreted the evidence, saying in its opinion, "as the railroad approaches Badger there is a heavy uphill grade" (R. 116). "Two locomotives were pulling the long train up a stiff grade" (R. 118). Even if the grade ended three-quarters of a mile west of Badger, which respondent seems to think is the case, the locomotives would still be pulling some of the cars upgrade when they (the locomotives) reached Badger because they hauled 70 cars and the train must have been nearly a mile long. It is odd that respondent did not show the grade upon its map (defendant's exhibit A-1 attached to respondent's brief) if it wished to make such a point of the matter.

If the evidence is to be reviewed it should be construed as favorably as possible to petitioner and all justifiable inferences which can be drawn from it should be drawn in petitioner's favor. The following summary, considered in connection with those portions of the evidence already referred to, gives a fair account of the case proved by petitioner.

The warehouse which contained the wool and sacks destroyed by the fire was only a few feet from the

main double track line of respondent's railway. (See defendant's Exhibit A-1, the map attached to respondent's brief). Said warehouse had a sloping shingle roof (R. 91).

The tracks run uphill as they approach Badger from the north so that an eastbound train travels upgrade (R. 86, 91). The grade is quite stiff (R. 59). The trains generally pull quite hard (R. 59, 91). Because of the heavy grade the trains are sometimes divided between Kiona and Badger (R. 91).

Petitioner's witness Fernandes, who is a sheepherder, testified that when trains climbed this grade he noticed that they emitted a great deal of smoke and he heard puffing. When asked if he saw anything besides smoke the witness answered, "Well, I didn't see anything much until this summer. (By this he probably meant the summer of 1927—the fire occurred in May, 1926). I kind of watched this summer and I saw some sparks coming out of the engine. * * * I never paid attention before." (R. 59, 60.)

The country in which the warehouse was located was very dry (R. 71). Except for sagebrush and bunch grass, little that was green or that had life to it grew there (R. 51 and 97). However, weeds grew all over that part of the country (R. 71), and the witness Fernandes testified that he had seen weeds, and

also Russian thistles (R. 79), at the Badger warehouse when the wind was blowing (R. 71 and 72). The witness Ben Agor was not at Badger on the day of the fire, but was thoroughly familiar with the vicinity and the surrounding country (R. 96). He stated that he had seen weeds and papers about the warehouse when the wind was blowing (R. 90) and had noticed thistles blowing across the right-of-way at times (R. 96). He also stated that sometimes there were severe winds at Badger (R. 96).

On the day of the fire, at noon, the wind was blowing from the west to the east (R. 51), that is, away from the tracks and toward the warehouse. The evidence does not show that the wind had changed or died down at the time the fire occurred. On that day the warehouse contained 50 or 60 sacks of grain and about 200 sacks (or 70,000 pounds) of wool, which was Peter Agor's 1925 and 1926 crop. (R. 54, 75, 89, 99.)

About 9:45 or 9:50 p. m. (R. 84) one of respondent's trains, coming over the upgrade from Kiona (R. 86), passed the Badger station going east. The train was a double-header, which hauled seventy freight cars (R. 85). The fireman upon one of the engines saw no fire at Badger when the train passed through (R. 85). The witness Fernandes, who lived at Badger (R. 48), was awakened about 10:00 p. m.,

and then discovered the warehouse to be on fire at its southwest corner (R. 56), which was the corner closest to the railway tracks. There "was quite a bit of fire" (R. 56), too much to attempt to extinguish (R. 57). It appeared to have started from the ground (R. 57) and had not, when first observed, reached the roof (R. 56). Soon after Fernandes first observed the fire the whole warehouse quickly became a mass of flames (R. 77).

When the train which had passed Badger reached the town of Vista, some fifteen or twenty minutes later (R. 85), the fireman who had seen no fire when the train went through Badger looked back, saw an illumination in the sky and said to the engineer, "It looks like the whole town of Badger is afire" (R. 85).

No one except Fernandes and two of respondent's employes lived within a mile and a half or two miles of Badger (R. 52, 54). Fernandes was asleep and there was no fire in his shack when the warehouse caught fire (R. 55). The evidence disclosed no fire in the shack of either of the railway employes. No other person had been seen at the warehouse on the day of the fire (R. 52, 82).

The fire in the locomotive which passed is the only fire which the evidence disclosed. If the warehouse was not ignited by sparks setting fire to its outside or

combustible material surrounding it, as the evidence indicates, the cause of the fire remains wholly unexplained.

On pages 8 to 10 of its brief respondent makes an argument to this court which should have been saved for a jury. In view of petitioner's evidence it is useless to cite authority to show the correctness of the holding of the Circuit Court of Appeals upon the question of the origin of the fire. Abundant authority was presented to that court when the matter was submitted to it and the court reviewed the evidence carefully, together with the cases bearing upon it, and, it is submitted, came to a correct conclusion upon this point.

SUMMARY

When a plaintiff, in a railway fire case, shows that the property damaged by fire was adjacent to railway tracks the railway company asserts that for that reason it could easily have been ignited without negligence upon the defendant's part and, therefore, that a nonsuit should be granted because of the failure to sufficiently prove negligence. When the property damaged by fire is shown to have been a great distance from the railway tracks the railway company asserts that the evidence is insufficient to show that

it could have set the fire. The stronger the plaintiff's case is upon the one point the weaker it is upon the other. There should be some way of passing safely between Scylla and Charybdis notwithstanding respondent's vacillating argument to the contrary.

The railway companies have a sufficient advantage, in being in possession of the evidence, and should not be permitted to refuse to make an explanation when possibly guilty of gross negligence but the plaintiff lacks ability to prove this.

Conclusion

It is respectfully submitted that the Circuit Court of Appeals correctly held that petitioner's evidence warranted the jury inferring that respondent set the fire but incorrectly held that no inference of negligence could be drawn therefrom.

JAMES B. HOWE,
DONALD G. GRAHAM,
JAMES B. HOWE, JR.,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1928.

No. [redacted] 23

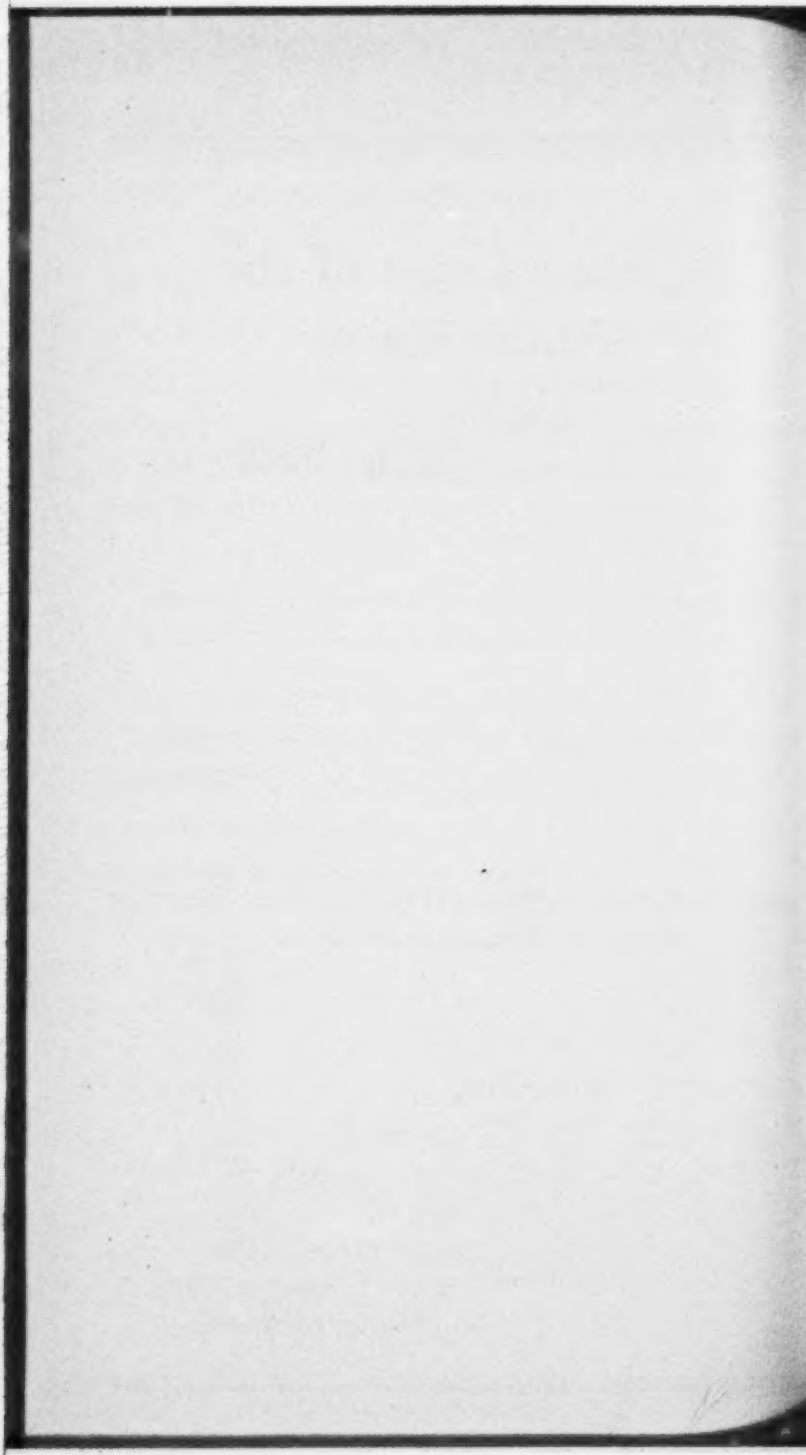
GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

L. B. daPONTE,
ARTHUR E. SIMON,
D. F. LYONS,
Counsel for Respondent,
909 L. C. Smith Building,
Seattle, Washington.



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As the court is not asked to consider any question of fact, respondent will not attempt to restate the case in accordance with its understanding of the record. The trial judge, who observed the witnesses and heard their testimony, held the evidence insufficient to justify submitting to the jury the question whether respondent set the fire. The Circuit Court of Appeals said, "It is the opinion of a majority of the Court that although the question is not free from doubt, there were facts and circumstances sufficient to call for submission to the jury" (R. 118).

It seems fair to say that it would be difficult to imagine a less substantial case than that presented by petitioner on the trial in District Court.

The reasons relied upon by petitioner for the allowance of a writ of certiorari are set forth on page 5 of the petition as follows:

> "1. The decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *McCullen vs. Chicago & North Western Railway Company*, 101 Fed. 66, upon the same matter.
>
> "2. The decision decides an important question of local law in conflict with applicable local decisions of the Supreme Court of the State of Washington (citing cases)."

1. Petitioner is mistaken in saying the decision decides a question of local law. The statement of the case and specifications of error show that the sole question in the case is whether there was any proof of negligence. That question is one of general law in the determination of which Federal courts are not bound by decisions of state courts.

This court has had occasion within a year to consider once more when a Federal court is required to follow the decisions of the courts of a state in which it is sitting. The following quotation from the opinion of the court in *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518, is sufficient to show that the second reason relied upon by petitioner is without substance:

> "As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow

the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift v. Tyson,* 16 Pet. 1, 19, was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded § 34 of the Judiciary Act. * * * *Railroad Company v. Lockwood,* 17 Wall. 357, 366, *declined to follow the state rule as to liability of common carriers for injury of passengers. Liverpool Steam Co. v. Phoenix Ins. Co.,* 129 U. S. 397, 443, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad v. Baugh,* 149 U. S. 368, 370, *so held as to the responsibility of a railroad company to its employees for personal injuries. Beutler v. Grand Trunk Railway,* 224 U. S. 85, 88, *decides who are fellow-servants as a question of general law."* (pp. 530-531.) (Italics ours.)

Not only is it well settled that questions of negligence are questions of general law, but this court has specifically held that burden of proof in a negligence case is "a matter of substance and not subject to control by laws of the several states." *New Orleans & N. E. R. R. Co. v. Harris,* 247 U. S. 367, 372.

The rules of this court in regard to certiorari provide that one of the reasons which will be considered in determining whether a writ of certiorari will be issued is that a Circuit Court of Appeals "has decided an important question of general law in a way probably untenable or in conflict with the weight of authority." If this reason is before the court, though not specifically stated in the petition, it will be sufficiently discussed in respondent's answer to the first reason stated in the petition.

2. As to the first reason relied upon, namely, that the decision is in conflict with a decision of the Circuit Court of Appeals of the Eighth Circuit, respondent's position is, first, that the

conflict is not such as to justify a writ of certiorari, and second, that the decision of the Circuit Court of Appeals of the Ninth Circuit was right and is supported by the decisions of this court and other Circuit Courts of Appeal.

The conflict is as to what constitutes negligence in a given case and what evidence is sufficient to send a case to the jury. There can be no conflict unless it be shown that the facts in the case tried in the Eighth Circuit and in this case are practically identical.

The case relied upon by petitioner is *McCullen v. Chicago & N. W. Ry. Co.*, 101 Fed. 66. The opinion was by Judge Thayer and in it he said:

> "it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property." (p. 70.)

The statement that the rule of law was "comparatively well settled" was not justified, for there was then and is now diversity of opinion on that question. The rule in most states that have no statute creating a presumption of negligence is that none arises from proof of the setting of a fire, and such was the general rule in those states, which now have statutes, prior to the time those statutes were enacted. Furthermore there was direct evidence of negligence. Judge Thayer said:

> "With respect to the issue whether the fire in question was occasioned by a spark from one of its locomotives, the defendant offered much expert testimony to the effect that a spark could not have been emitted by either of its locomotives, and carried a distance of 302 feet from its track, which would have retained sufficient vitality to have set fire to the slats of the ventilator under the conditions which existed at the time the fire took place. On the other hand, a railroad engineer who was called by the plaintiff

testified, in substance, that under such conditions as prevailed on the day of the fire,—with the wind from the north, blowing about 10 miles an hour, and the train moving on an upgrade,—a spark might have been carried 302 feet, and might have set fire to such slats as were in the ventilator, although the ventilator was at a height of 35 feet above the ground, provided the spark arrester of either engine was at the time in a defective condition. Another witness, who met the train in question on the day of the fire a few miles east of the town of St. Lawrence, also testified that the leading or head locomotive was then emitting large sparks, which floated 264 feet from the track, as ascertained by a subsequent measurement. Another witness testified, in substance, that he had, on one occasion previous to the fire, seen sparks emitted by locomotives which were in use by the defendant company that rose to a considerable height, and floated as much as 600 feet from the track, before they expired." (pp. 68-69.)

The *McCullen case* is not a parallel case to this case, for in this the record is absolutely bare of direct evidence of negligence.

The *McCullen case* arose in South Dakota. That state has since enacted a statute under which proof of setting a fire by a locomotive creates a presumption of negligence. That the Circuit Court of Appeals of the Eighth Circuit would today in a case arising in a state which had no such statute follow its holding in the *McCullen case* cannot be affirmed with certainty as that court has since gone further than almost any other Federal court in holding the statutory presumption overcome by the evidence of the railway company, and that a verdict for defendant should be directed by the court. *Woodward v. Chicago, M. & St. P. Ry. Co.*, 145 Fed. 577.

The conflict on which petitioner relies is not merely between a decision of the Circuit Court of Appeals of the Eighth Cir-

cuit and a decision of the Circuit Court of Appeals of the Ninth Circuit, but is between a decision of the former court on one side and decisions of the Circuit Court of Appeals of the Ninth Circuit and of the Circuit Court of Appeals of the Sixth Circuit on the other. In discussing cases holding that a presumption of negligence arises from proof of setting a fire, the Circuit Court of Appeals said in the instant case, 28 Fed. (2d) 576 (R. 119):

> "But in the better considered cases in the federal courts it is held that the question is one of general law, and that it cannot be said that the mere ignition by sparks is prima facie evidence of negligence of the railroad company. Such was the opinion expressed by Judge Taft for the Circuit Court of Appeals of the Sixth Circuit in Garrett v. Southern Ry. Co., 101 F. 102, 49 L. R. A. 645, a case quite like the one at bar, where the court, after recognizing that there is contrariety of decision, cited the Nitroglycerine Case, 15 Wall 524, 21 L. Ed. 206, and invoked the principle that one who charges negligence must prove it by showing that defendant, by his act or by his omission, has violated some duty incumbent upon him which has caused the injury complained of.
>
> "Again, in Toledo, St. Louis & W. R. Co. v. Star Flouring Mills Co., 146 F. 953, the Circuit Court of Appeals, speaking through Judge Lurton, after citing decisions presenting the conflict upon the question whether evidence that a fire was started by escaping sparks constitutes, without more, a prima facie case of negligence, affirmed Garrett v. Southern Ry. Co., supra. The court held that the more logical view is that the gravamen of an action for loss of property by fire communicated by sparks is negligence, and that 'inasmuch as a railway company may lawfully use locomotives it cannot be made liable for a loss from sparks emitted, unless plaintiff shows such sparks to have been negligently emitted,' and that the burden of showing negligence is upon him who affirms it. See, also,

Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co. (C. C. A. 6) 139 F. 528, 1 L. R. A. (N. S.) 533; Louisville & Nashville R. Co. v. Bell (C. C. A. 6) 206 F. 395.

"(3) We agree with the general doctrine of the federal cases cited. Slight evidence may be sufficient to show negligence, but where, as here, there is really nothing beyond the fact that the building was burned by sparks which, by common knowledge, must to some extent escape from a locomotive hauling a train, there is no evidence which calls for rebuttal."

In the *Garrett case, supra,* the court was composed of Circuit Judges Taft, Lurton and Day. The court said:

"It is urged upon us that in the state of Tennessee, in Burke vs. Railroad Co., 7 Heisk. 451, and Simpson vs. Railroad Co., 5 Lea. 456, the law of Tennessee has been settled in favor of the contention of the plaintiffs in error here that proof of fire from sparks is prima facie evidence of negligence. As we have said, this question is not controlled by any statute in Tennessee, and the rules of evidence in the Federal Court are questions of general law, not controlled by state decisions. We think we must take as our guide in this action the intimation of the Supreme Court of the United States in the Nitroglycerine Case, 15 Wall. 524; 21 L. Ed. 206. In that case a lessor attempted to hold a lessee for damages for injuries to the building leased by the explosion of nitroglycerine while in charge of the defendants. Upon this point the court, speaking by Mr. Justice Field, held as follows:

'This action is not brought upon the covenants of the lease. It is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants. Unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business. A party charging negligence as a ground of action must

prove it. He must show that the defendant by his act, or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of. * * * Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases—in cases where fire originating in one man's building has extended to and destroyed the property of others; *in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives,* or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one.'" (pp. 103-104). (Italics ours).

In *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.,* 139 Fed. 528, also relied upon by the Circuit Court of Appeals of the Ninth Circuit, Judge Lurton gave full effect to the rule announced in the *Garrett case, supra,* saying:

"The presumption from evidence of a fire started by sparks from a railway engine is in many states determined by statute. But at the common law a prima facie case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use of such engine being sanctioned by statute, there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. The ground of action being, therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks in view of the fact that some sparks will escape despite the use of appliances to arrest them. Garrett v. Southern Ry. Co., 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; 13 Am. & Eng. Ency. Law, 507, 508, and cases cited in notes.

> But evidenec of escape of larger sparks than usual, or an unusual number of sparks, has been held prima facie evidence of want of due care." (p. 537).

The rule was again affirmed by the Circuit Court of Appeals of the Sixth Circuit in *Louisivlle & N. R. Co. v. Bell,* 206 Fed. 395 (1913).

Petitioner refers to the case of *Eddy v. Lafayette,* 163 U. S. 456, as authority for its position. This is also an Eighth Circuit case. The trial court instructed the jury that proof of setting of the fire created a presumption of negligence. This court did not consider the question, as it said with reference to the instruction:

> "it is assigned for error in this court that the Circuit Court of Appeals erred in not correcting this error. It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the Circuit Court of Appeals." (p. 466).

It seems unnecessary to review petitioner's discussion of the cases in the Sixth Circuit and its futile attempt to distinguish them. That they are authority for the position of the Circuit Court of Appeals of the Ninth Circuit the quotations given above make perfectly clear.

Counsel seems to distinguish between a *prima facie* case of negligence and the right of a jury to draw an inference of negligence from evidence of the setting of a fire (Petitioner's Brief, pages 18 and 19). Perhaps this somewhat academic distinction can be drawn in theorizing on the law of evidence, but it is a useless distinction here, for the practical rule, as shown by decided cases, is that proof of the setting of the fire is either *prima facie* evidence of negligence that will take a case to the jury and support a verdict, or is no evidence of negligence. The very cases in the Supreme Court of Washing-

ton and in the Circuit Court of Appeals for the Eighth Circuit on which petitioner relies hold that proof of the setting of the fire makes a *prima facie* case of negligence.

The *McCullen case* and the *Garrett case* were both decided in March, 1900, so any conflict that resulted has existed for twenty-eight years. No decision of this court since 1900 suggests that the Circuit Court of Appeals of the Sixth Circuit was wrong in taking as its guide the intimation of this court in the *Nitro-Glycerine case*. In fact, this court has reaffirmed the rule that negligence must be proved. In *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367, a case arising under the Federal Employers' Liability Act, tried in the state courts of Mississippi, this court said:

> "The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case*, 15 Wall. 524, 537; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 487; *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 85." (p. 371).

We submit the decision of the Circuit Court of Appeals of the Ninth Circuit was right and that a writ of certiorari ought not to issue in this case merely to settle a rather doubtful conflict with a decision of the Circuit Court of Appeals of the Eighth Circuit.

Respectfully submitted,

L. B. daPONTE,
ARTHUR E. SIMON,
D. F. LYONS,
Counsel for Respondent,
909 L. C. Smith Building,
Seattle, Washington.

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IN THE

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OCTOBER TERM, 1929.

No. 23.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Respondent.

BRIEF OF RESPONDENT ON MERITS.

L. B. daPONTE,
DENNIS F. LYONS,
Attorneys for Respondent.

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STATEMENT OF THE CASE.

Respondent accepts the statement of the case made by Petitioner so far as it relates to the parties to the case, the time and place of the fire, the amount of loss, etc. The argument of Respondent will disclose any differences of opinion as to what the record contains. As there were but four witnesses and there are but fifty-three pages of testimony (R. 47-100) there will be no difficulty in determining the facts as disclosed by the evidence. In the argument herein Respondent is referred to as defendant and Petitioner is referred to as plaintiff. The map reproduced in this brief, Defendant's Exhibit A-1, shows the buildings at Badger. Kiona is seven miles to the West and Vista is nine miles to the East. The train which it is claimed set the fire was east bound.

ARGUMENT.

The opinion of the Circuit Court of Appeals covers two questions, first, was there sufficient evidence to take to the jury the question whether defendant's locomotive set the fire and second, was there sufficient evidence to take to the jury the question of negligence. The decision affirming the judgment in the trial court in favor of defendant is based upon a negative answer to the second question. In answer to the first question the Circuit Court of Appeals said:

> "It is the opinion of a majority of the court that although the question is not free from doubt, there were facts and circumstances sufficient to call for submission to the jury." (R. 118)

We propose to show not only that the Circuit Court of Appeals was right in determining that there was no evidence of negligence but also that the trial court was right in holding there was no evidence that defendant set the fire. The review of the evidence that follows is necessary to a decision on either question.

The question whether there was sufficient evidence that defendant set the fire to warrant its submission to the jury is not foreclosed by the opinion of the majority of the Circuit Court of Appeals, as plaintiff seems to assume, but is open for consideration here.

> "It is undoubted that by the operation of the writ of certiorari, granted in accordance with the provisions of the Judiciary Act of 1891, the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that court." *Lutcher & Moore Lumber Co. v. Knight,* 217 U. S. 257, 267.

"As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done when hearing the writ of error sued out for the review of the action of the Circuit Court. *Lutcher & Moore Lumber Co. v. Knight,* 217 U. S. 257, 267." *Delk v. St. Louis & San Francisco R. R.,* 220 U. S. 580, 588.

As the judgment was in defendant's favor in the Circuit Court of Appeals defendant could not petition for certiorari. While a party may not complain of any part of a judgment from which he does not appeal, he surely may make any valid argument to sustain the judgment on which he relies. If the majority of the Circuit Court of Appeals was in error in holding the evidence was sufficient to take to the jury the question whether the defendant set the fire, the defendant may show that error in this court as a reason why the judgment of the Court of Appeals was right, though its reasoning on this one point was wrong. In that event there would be no occasion for this court to go further and determine whether the Circuit Court of Appeals was correct in holding that the evidence did not create a *prima facie* case.

The situation is somewhat analogous to that which exists on appeal to this court from a state court. The rule in such cases is given in *Crescent Live Stock Co. v. Butchers' Union,* 120 U. S. 141, 156:

"for it has been the uniform doctrine of this court that, where it appears that the judgment of the state court must be affirmed on other grounds disclosed in the record, it will not be reversed for an erroneous ruling of the state court on a Federal question not necessary to the decision of the cause. *Murdock v. City of Memphis,* 20 Wall. 590,

634; *Jenkins v. Loewenthal*, 110 U. S. 222; *Erwin v. Lowry*, 7 How. 172; *Gibson v. Chouteau*, 8 Wall. 314."

We do not mean to suggest that we entertain any doubt as to the correctness of the decision of the Circuit Court of Appeals on the question of negligence, but merely want to establish our right to show that there was no evidence that defendant set the fire.

THERE WAS NO EVIDENCE THAT DEFENDANT SET THE FIRE.

The first witness called by plaintiff was Higinio Fernandes, a sheep herder. He testified he was asleep in his shack on the night of May 2 when he was awakened by a section foreman of the defendant. The map does not show this shack, but if shown it would be in the upper right hand corner. He got up and went out to see what was wrong (R. 55). Though not sure he thought it was "pretty close to 10:00 o'clock" (R. 56). On direct examination he said he saw the fire on the southwest corner of the warehouse (R. 56). In answer to a question from the court he said: "All that side of the building was on fire" (R. 57). The warehouse was built on piles five or six feet from the ground (R. 70). Witness does not know whether or not there was fire on the ground when he arrived (R. 70). This witness was the principal witness for plaintiff and this is all the testimony he gave directly relating to the origin of the fire.

This witness testified that the railroad was mostly upgrade from Kiona to Badger, but did not testify that there was any grade through Badger (R. 61). His testimony on this point on cross-examination is:

"Q. Now, you were talking something about the grade from Kiona up to Badger. What do you know about the grade?

A. Well, I know that there is a grade going up the hill.

Q. Well, where does the grade run with reference to the Badger station? Is there still a grade when you get by what you call Badger?

A. *I don't think so.* (Italics supplied.)

Q. Isn't it a fact that three-quarters of a mile before you get into Badger you are on a level grade and on a descending grade? Do you know that?

A. Well, I ain't sure.

Q. And it had been the habit of the railroad company to put on a helper engine on freight trains at Kiona and the helper engine would cut off at Badger, wouldn't it? That is, ordinarily. That they would take the second engine off at Badger, isn't that right?

A. Sometimes." (R. 61.)

The testimony of this witness as to the way in which defendant's engines are operated was developed by the court:

"The Court: What do you see about the engines when they go up this grade?

A. I see lots of smoke.

The Court: How is that?

A. I see lots of smoke.

The Court: And what do you hear?

A. I don't hear nothing just the puffing.

Q. Just the puffing?

A. Yes, sir.

Q. And what did you see besides smoke?

A. Well, I didn't see anything much until this summer. I kind of watched this summer and I saw some sparks coming out of the engine.

Q. Sparks coming from where? (63-17)

A. From the chimney or whatever they call it, but I never paid attention before." (R. 59-60)

The fire occurred May 2, 1926, and this case was tried in November, 1927, so "this summer" refers to a period a year after the fire.

As to the wind, the testimony of this witness was:

"Q. And what was the—was there a wind or was it quiet?

A. At noon there was a wind blowing.

Q. There was a wind blowing?

A. Yes, sir.

The Court: You might ask him which way.

Q. What direction—which way?

A. It was a west wind." (R. 51)

No other witness testified about the wind or about the throwing of sparks.

There was no allegation that defendant had negligently permitted weeds and combustible material to accumulate on the right of way. Witness Fernandes testified that there is nothing but sand and sagebrush around Badger, and some weeds when the wind blows (R. 71). He later said he sometimes saw Russian thistles blowing around, but that he "never paid attention" (R. 79).

Plaintiff next called as a witness Hugh Palmer, who testified that he was fireman on one of two engines that hauled an east bound freight train of seventy cars through Badger about 9:45 or 9:50 P. M. on May 2; that he saw no fire until he got to Vista, a station nine miles east of Badger; that he then looked back and saw the sky illuminated and said to the engineer: "It looks like the whole town of Badger is afire." He testified that the run from Badger to Vista was made in fifteen or twenty minutes (R. 84-85). It was, therefore, but ten minutes after the train passed that, according to Fernandes' testimony *supra*, the whole south side of the warehouse was on fire.

Ben Agor, the next witness for plaintiff, testified to the existence of a grade between Kiona and Badger, but did not say

where it began or ended. He said the engines "labor very hard at times with a heavy load" (R. 91). In answer to the question, "And what is done by the railroad company at times to avoid this extra laboring on the grade—on the up grade?" he said, "I have noticed that sometimes they split the train" (R. 91). He was not at Badger at the time of the fire. As to the existence of combustible matter in the vicinity, his testimony was confined to three questions, as follows:

"Q. In that locality are there accumulations of dry weeds and other combustible material blowing around during a dry wind?

A. I have seen tumbleweeds and I have seen some papers around about the warehouse.

Q. Is the warehouse on the ground or off of the ground?

A. I imagine it is about three or four feet off of the ground.

Q. And is the opening—below the floor of the warehouse is it open or is it boarded up?

A. It is open." (R. 90-91)

On cross-examination his testimony was:

"Q. Did you intend to leave any impression with this jury that there was any blowing of weeds or thistles around this warehouse or under this warehouse at the time of this fire?

A. Well, what I have noticed during a hard wind there —I have noticed thistles blowing across the right of way at times. (101-55)

Q. You are not testifying that there were any thistles blowing at the time of the fire, are you?

A. Well, I was not there at the time of the fire, no." (R. 96)

The last witness, R. W. Dent, an insurance agent, proved the issuance of policies covering the wool stored in the warehouse (R. 97).

Defendant submits that the evidence on behalf of plaintiff is wholly insufficient to sustain a finding that the Railway Company set the fire. There is no evidence of a grade at Badger. There is no evidence that the engines were working steam when the train went through Badger station. There is no evidence that they were throwing sparks. There is no evidence of combustible material being near the warehouse at the time of the fire or that any engine of defendant threw sparks before the fire. No witness testified that there was a wind blowing later than noon on the day of the fire. Witness Fernandes' testimony is that ten minutes after the train passed, the south end of the building standing four or five feet from the ground was on fire between the floor and the roof. The whole building was on fire in twenty minutes. There is no evidence that there was any fire on the ground. That a spark could have accomplished all this in so short a time does not seem reasonable and no testimony was offered to substantiate such a conclusion. The comment of the trial court on this point when directing a nonsuit clearly states the total absence of evidence that defendant set the fire:

> "I confess in this case there is not any theory of the law that I can conceive of upon which I could tell the jury to predicate a verdict based upon facts, or a reasonable inference. There is no evidence that anyone ever saw any sparks emitted from this engine, and the only evidence with relation to sparks is that the first witness at one time saw some sparks emitted from an engine that was laboring and going up this grade with a train of cars. And there is an absence of any evidence as to any inflammable material either on the railroad track or between the railroad track and this warehouse or under the warehouse anywhere. And the further testimony is that at the time this particular train came to the station on the east, that the engineer looked back and saw the fire and remarked

that it looked as though the whole town of Badger was aflame.

"Now, for the Court to submit to the jury the question of fact as to whether a spark emitted from an engine in ten or fifteen or twenty-five minutes could create a flame that would cast such a reflection as to inspire the thought of this fireman, burning a wooden warehouse set on piles three and a half or four feet from the ground, and then the evidence shows that at ten o'clock, shortly after the train went by the fire was contained within the scope disclosed by the witness—I cannot conceive how I can do that.

"I am very loath always to grant nonsuits. I rarely do it, but when there is an absence of facts—Now then, the statement of Mr. Howe. The fact that the fire in the engine was the only fire disclosed by the evidence, I do not think that that could possibly be—supposing no evidence was presented, the Court could not possibly let a verdict stand upon the mere fact that an engine with fire in it passed a warehouse fifty feet away and the warehouse was aflame half an hour afterwards and the light created the impression upon the fireman as disclosed here." (R. 102-103)

That any one of several things might have caused this fire was shown on cross-examination. Witness Fernandes testified that the key to the warehouse was kept where anyone could get it (R. 75, 80); that hoboes frequented the place (R. 83); that there were many rats in the warehouse (R. 75); that there was considerable enmity between his outfit and another outfit in the vicinity (R. 65); that there was a public road running by the warehouse and that there were cooking utensils in the warehouse which had been used by the sheep shearers some days before (R. 76). Rats and matches have started many fires. Wool on which oil has been spilled is ideal for spontaneous combustion. It is common knowledge that innumerable fires occur, the origin of which is unknown.

Citation of authorities on this point would not help. Opinions of courts vary but we doubt if any well-considered case can be found in which a court permitted a verdict to stand on such evidence as was introduced in this case. We suggest that the majority of the Circuit Court of Appeals might well have hesitated to say there was a case for the jury on the question of setting the fire if they were not of the opinion that in no event could a recovery be had since there was no proof of negligence. We submit the judgment of the trial court on this question was right.

THERE WAS NO EVIDENCE OF NEGLIGENCE.

If it be determined that the majority of the Circuit Court of Appeals was right in holding the question of the origin of the fire was for the jury, there remains for consideration the question whether the Circuit Court of Appeals was right in holding that there was no evidence of negligence. That this is a question of general law which Federal courts may determine for themselves is clear. In *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company,* 276 U. S. 518, this court said:

> "As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift v. Tyson,* 16 Pet. 1, 19, was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded

§ 34 of the Judiciary Act. * * * *Railroad Company v. Lockwood*, 17 Wall. 357, 366, *declined to follow the state rule as to liability of common carriers for injury of passengers. Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 443, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 370, *so held as to the responsibility of a railroad company to its employees for personal injuries. Beutler v. Grand Trunk Railway*, 224 U. S. 85, 88, *decides who are fellow-servants as a question of general law.*" (pp. 530-531) (Italics supplied.)

This brings us to an analysis of the Federal cases that are in point. We may first consider *Garrett et al. v. Southern Railway Company*, 101 Fed. 102 (Circuit Court of Appeals, Sixth Circuit, March 15, 1900). In this case the court, composed of Circuit Judges Taft, Lurton and Day, reviewed a judgment for the defendant, Southern Railway Company, entered upon a verdict of the jury in a suit to recover damages for alleged negligence resulting in the burning of a mill owned by plaintiff. It was claimed that the fire was caused by sparks emitted from an engine negligently constructed and operated by the defendant. Defendant denied that sparks from its engine set the fire, and denied negligence. The court held that mere ignition by sparks is not *prima facie* evidence of negligence. The Circuit Court of Appeals of the Ninth Circuit in the instant case, referring to the *Garrett case*, says:

"We are referred to decisions which hold that where the circumstances lead to the conclusion that the origin of the fire was from a locomotive, there is a *prima facie* case and the burden of showing that there was no negligence in construction or operation of the locomotive is upon the railroad company. The Supreme Court of Washington seems to have accepted that view. (Thorgrimson v. Northern

Pacific Ry., 64 Wash. 500; Shearman & Redfield on Negligence, sec. 675 et seq.; Elliott on Railroads, sec. 1766.) But in the better considered cases in the federal courts it is held that the question is one of general law and that it cannot be said that the mere ignition by sparks is *prima facie* evidence of negligence of the railroad company. Such was the opinion expressed by Judge Taft for the Court of Appeals of the Sixth Circuit in Garrett v. Southern Ry., 101 Fed. 102, a case quite like the one at bar, where the Court, after recognizing that there is contrariety of decision, cited the Nitroglycerin Case, 15 Wall. 524, and invoked the principle that one who charges negligence must prove it by showing that defendant, by his act or by his omission, has violated some duty incumbent upon him which has caused the injury complained of." (R. 119)

In the brief of plaintiff in support of its petition for a writ of *certiorari* the *Garrett case* is discussed and analyzed as follows:

> "The *Garrett* case does not hold that a jury may not infer negligence, from the fact of the fire, and thereby establish negligence. On the contrary it authorized such an inference and, your petitioner submits, it is highly favorable to your petitioner's contention. The *Garrett* case is the case chiefly relied upon by the court in deciding the case at bar against your petitioner." (p. 19)

In plaintiff's brief on the merits, counsel say:

> "Petitioner's only present request is that the Supreme Court of the United States adhere to the view expressed by its present Chief Justice when he wrote the opinion in the *Garrett* case." (p. 24)

Either the Circuit Court of Appeals of the Ninth Circuit or counsel for plaintiff has misread the opinion in the *Garrett case*. There was evidence at the trial of the *Garrett case* that

under approved methods of constructing and operating locomotives it was improbable that fire could be communicated by sparks from an engine without negligence. There was not a word of this sort of testimony in the instant case. In the *Garrett case* the trial judge instructed the jury that

> "as the plaintiffs charged the defendant with negligence, the burden was on the plaintiffs to show the defendant's negligence by a preponderance of the evidence; that when the plaintiffs *established* by such preponderance *the mere fact that the fire was caused by sparks from an engine of the defendant, it still remained for him to prove that the emitting of such sparks was due to defendant's negligence;* * * *." (p 103) (Italics supplied.)

It is the total absence of evidence of negligence that distinguishes the instant case from the *Garret case*. In the *Garrett case* the court said:

> "We think we must take as our guide in this action the intimation of the supreme court of the United States in the Nitroglycerin Case, 15 Wall. 524, 21 L. Ed. 206. In that case a lessor attempted to hold a lessee for damages for injuries to the building leased by the explosion of nitroglycerin while in charge of the defendants. Upon this point the court, speaking by Mr. Justice Field, held as follows:
>
> > 'This action is not brought upon the covenants of the lease. It is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants. Unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident while engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant by his act, or by his omission, has violated some duty incumbent

upon him, which has caused the injury complained of. The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a prima facie case, which the carrier must overcome. His contract is shown, prima facie, at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and, if he has not, the plaintiff must prove it. Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. This principle is recognized and affirmed in a great variety of cases,—in cases where fire originating in one man's building has extended to and destroyed the property of others; *in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives,* or caused by horses running away, or by blasting rocks; and in numerous other cases which will readily occur to everyone.'

"We think that this language indicates that the Supreme Court of the United States would adhere to the older and more conservative view that the mere ignition by sparks is not prima facie evidence of negligence of the railroad company as a matter of law. *It may be that evidence as to the approved methods for preventing emission of dangerous sparks may justify an inference of fact that the fire could not have been thus communicated without negligence. This was the charge of the court.* The jury were given permission, from the mere fact of the ignition by sparks, to infer, if they could as a matter of fact, that it was caused by negligence; but the court de-

clined to charge them, as a matter of law, that it raised a presumption of negligence. The course of the court, we think, was well within the rule, as we understand the cases, which the supreme court of the United States has followed, and that no prejudice was done to the plaintiffs in the charge which was given. The judgment is affirmed." (pp. 103-104) (Italics supplied.)

Counsel failed to include in their excerpts from the court's opinion the part italicized in the last paragraph quoted above and so present an erroneous analysis of the opinion.

Granting, as counsel contend, the holding of the court is that proof of setting the fire creates no presumption of negligence as a matter of law, or otherwise expressed, does not require a verdict of negligence from the jury, it is equally true that the *Garrett case* does not hold that mere proof of setting a fire creates a *prima facie* case of negligence, i. e. evidence sufficient to justify but not compel a verdict for plaintiff. The trial court charged that (and this charge was approved) the mere fact that the fire was caused by sparks was insufficient and that proof of negligence was necessary. Evidence to show negligence was introduced, and it was only because it was introduced, that the case went to the jury.

What the *Garrett case* means appears from *Cincinnati, etc., Railway Company v. South Fork Coal Company,* 139 Fed. 528, in which Mr. Justice Lurton, then Circuit Judge, said:

"The presumption from evidence of a fire started by sparks from a railway engine is in many states determined by statute. But at the common law a prima facie case of negligence is not made out by mere evidence that it was started by sparks from a railway engine. The use of such engine being sanctioned by statute, there is no liability for a fire started from sparks unless the sparks were negligently suffered to escape. *The ground of action being,*

therefore, for the negligent escape of sparks, a case is not made out by mere proof that it was started by sparks in view of the fact that some sparks will escape despite the use of appliances to arrest them. Garrett v. Southern Ry. Co., 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; 13 Am. & Eng. Ency. Law, 507, 508, and cases cited in notes. But evidence of escape of larger sparks than usual, or an unusual number of sparks, has been held prima facie evidence of want of due care." (p. 537) (Italics supplied.)

Counsel say this is *dictum,* and it probably is, but Judge Lurton was one of the three judges who decided the *Garrett case,* so there can be no question but that the opinion quoted expressed Judge Lurton's confirmed views on the subject. Counsel contend that inasmuch as the case Judge Lurton was considering was a collision between two trains, which the court held to create a presumption of negligence, by similar reasoning the setting of a fire by sparks from a locomotive should create a presumption of negligence. Counsel say: "A collision could occur, without negligence, as readily as a fire caused by sparks could occur without negligence" (Petitioner's Brief, p. 26). The fallacy in this reasoning is that sparks escape from locomotives in the normal and customary operation of railroads but collisions do not occur in the normal and customary operation of railroads, and indeed it would be a strange case in which a collision could occur in the absence of any negligence.

The *Garrett case* and the *South Fork Coal Company case* were cited by the Circuit Court of Appeals for the Sixth Circuit in *Louisville & Nashville R. R. Co. v. Bell,* 206 Fed. 395. The court said:

> "No one saw the spark enter the window and no one saw the kindling and first moments of the flames. Plaintiff depends wholly upon circumstantial evidence. This court

has considered that two things are essential to plaintiff's right to recover. First, that the fire was set by such a spark; and second, that the spark escaped through defendant's negligence. Garrett v. Railroad, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; Railway v. South Fork Co., 139 Fed. 528, 537, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533. There is no statute in Tennessee declaring prima facie liability in such case, or changing the common-law rules of liability or of proof." (p. 397)

In the Ninth Circuit the rule relied upon by the Circuit Court of Appeals in the instant case had already been announced in *Northern Pacific Railway Company et al. v. Mentzer*, 214 Fed. 10, 22.

Plaintiff relies upon the decisions in the Circuit Court of Appeals of the Eighth Circuit and particularly an opinion by Judge Thayer in *McCullen v. Chicago & North Western Ry. Co.*, 101 Fed. 66 (March 26, 1900). In that case Judge Thayer said:

> "it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property." (p. 70)

However, this statement must be taken in connection with the evidence in the case. As to that the court said:

> "With respect to the issue whether the fire in question was occasioned by a spark from one of its locomotives, the defendant offered much expert testimony to the effect that a spark could not have been emitted by either of its locomotives, and carried a distance of 302 feet from its track, which would have retained sufficient vitality to have set fire to the slats of the ventilator under the conditions which existed at the time the fire took place. On the other hand, a railroad engineer who was called by the plaintiff

testified, in substance, that under such conditions as prevailed on the day of the fire,—with the wind from the north, blowing about 10 miles an hour, and the train moving on an upgrade,—a spark might have been carried 302 feet, and might have set fire to such slats as were in the ventilator, although the ventilator was at a height of 35 feet above the ground, provided the spark arrester of either engine was at the time in a defective condition. Another witness, who met the train in question on the day of the fire a few miles east of the town of St. Lawrence, also testified that the leading or head locomotive was then emitting large sparks, which floated 264 feet from the track, as ascertained by a subsequent measurement. Another witness testified, in substance, that he had, on one occasion previous to the fire, seen sparks emitted by locomotives which were in use by the defendant company that rose to a considerable height, and floated as much as 600 feet from the track, before they expired." (pp. 68-69)

Surely this is enough to distinguish the *McCullen case* from the instant case. We believe the Circuit Court of Appeals of the Eighth Circuit has, since the *McCullen case,* gone as far and perhaps farther than any other Federal court in holding the statutory presumption overcome as a matter of law by evidence of the railway company. *Woodward v. Chicago, M. & St. P. Ry. Co.,* 145 Fed. 577. If the instant case had been tried in the Eighth Circuit it does not follow from the holding in the *McCullen case* that the Circuit Court of Appeals for the Eighth Circuit would ever have sustained a verdict for the plaintiff on this record.

The Circuit Court of Appeals of the Sixth Circuit in the *Garrett case* relied upon the *Nitro-Glycerine case.* This court has never qualified its holding in that case but cited it with approval in *New Orleans & N. E. R. R. Co. v. Harris,* 247 U. S. 367, a case arising under the Federal Employers' Liability Act tried in the state courts of Mississippi. This court said:

"The federal courts have long held that where suit is brought against a railroad for injuries to an employe resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case,* 15 Wall. 524, 537; *Patton v. Texas & Pacific Ry. Co.,* 179 U. S. 658, 663; *Looney v. Metropolitan R. R. Co.,* 200 U. S. 480, 487; *Southern Ry. Co. v. Bennett,* 233 U. S. 80, 85." (p. 371)

In the *Patton case,* referred to above, the court said:

"And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." (p. 663)

As we have a question of general law the decisions of the Supreme Court of Washington are not controlling, but admitting that that court has adopted the rule that proof of setting a fire establishes a *prima facie* case of negligence, nevertheless, in the application of that rule it is found that in cases in which there was a recovery there was some evidence of negligence on the part of the defendant.

Counsel for plaintiff evidently appreciate the necessity for showing evidence of negligence for their first point is:

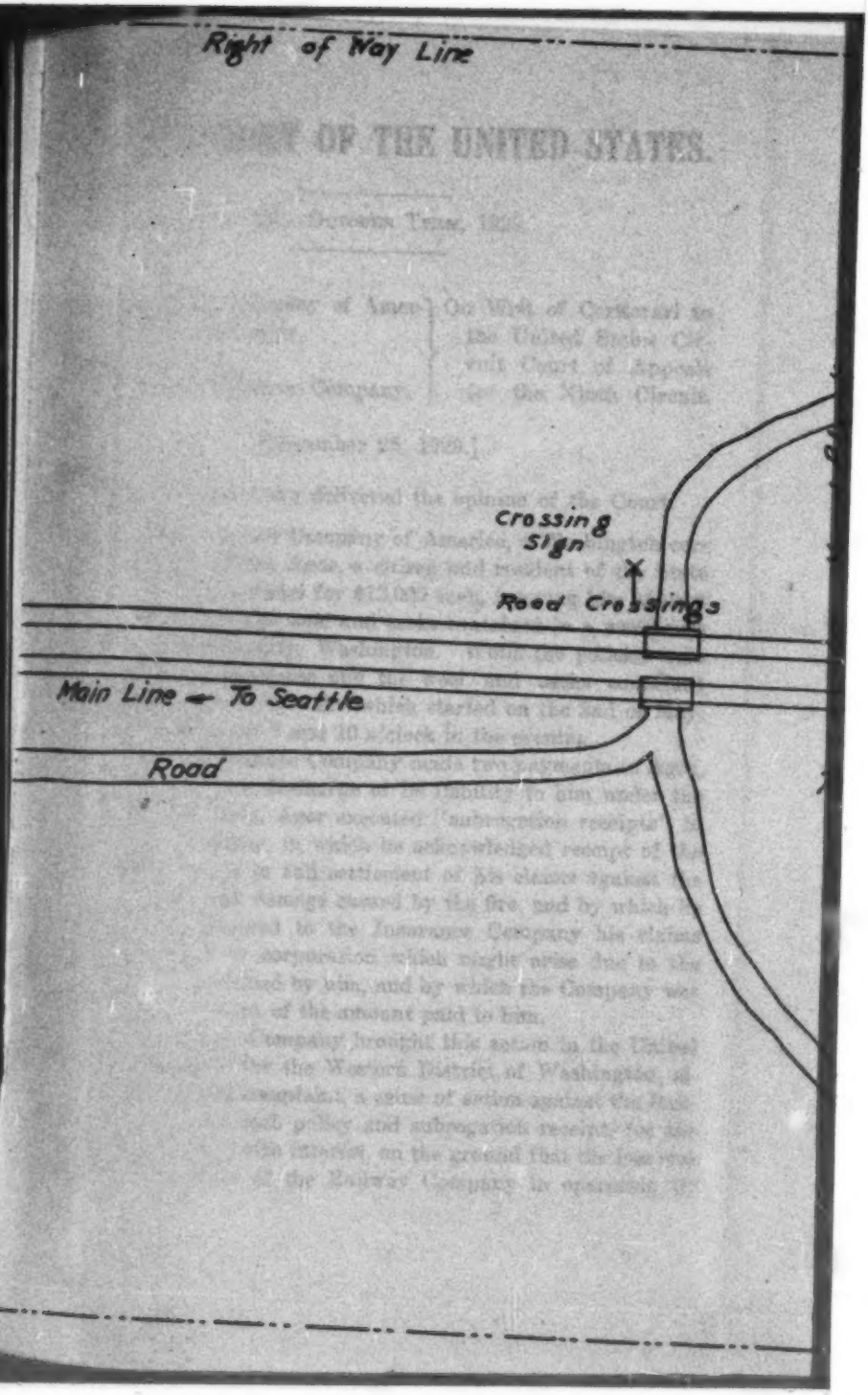
"Petitioner contends that the evidence discloses facts from which a reasonable person could have justifiably drawn the inference that respondent was negligent." (Brief of Petitioner, p. 7.)

However, the only evidence of negligence put forth in support of this point is the testimony of one witness, Ben Agor, that defendant sometimes divided its trains between Kiona and Badger. All he said was: "I have noticed that sometimes they split the train" (R. 91). There is no testimony as to the circumstances under which trains are cut or how often that happens. There is no testimony that trains are cut to avoid the fire hazard rather than because the engine is unable to handle the load over a grade. In this connection it should be remembered that there is no evidence of a grade at Badger and therefore the cutting of a train could have no relation to operation through Badger. The train complained of was a train of seventy cars drawn by two engines on the main line of the Northern Pacific. The fireman testified that it was a light train (R. 87). There was no evidence that this particular train should have been cut. Indeed it is hard to believe that any witness would give testimony so manifestly untrue. This "first point" merely emphasizes the fact that the record is bare of evidence of negligence.

Plaintiff is asking the court to reverse a rule that has been in effect in this court and in Federal courts generally, at least since the decision in the *Nitro-Glycerine case, supra,* more than fifty years ago. We submit that plaintiffs in negligence cases are now highly favored in the law, and that they have little difficulty in obtaining verdicts in meritorious cases. We believe that nothing has been shown to justify changing the established rule in negligence cases in Federal courts.

Respectfully submitted,

L. B. daPONTE,
DENNIS F. LYONS,
Attorneys for Respondent.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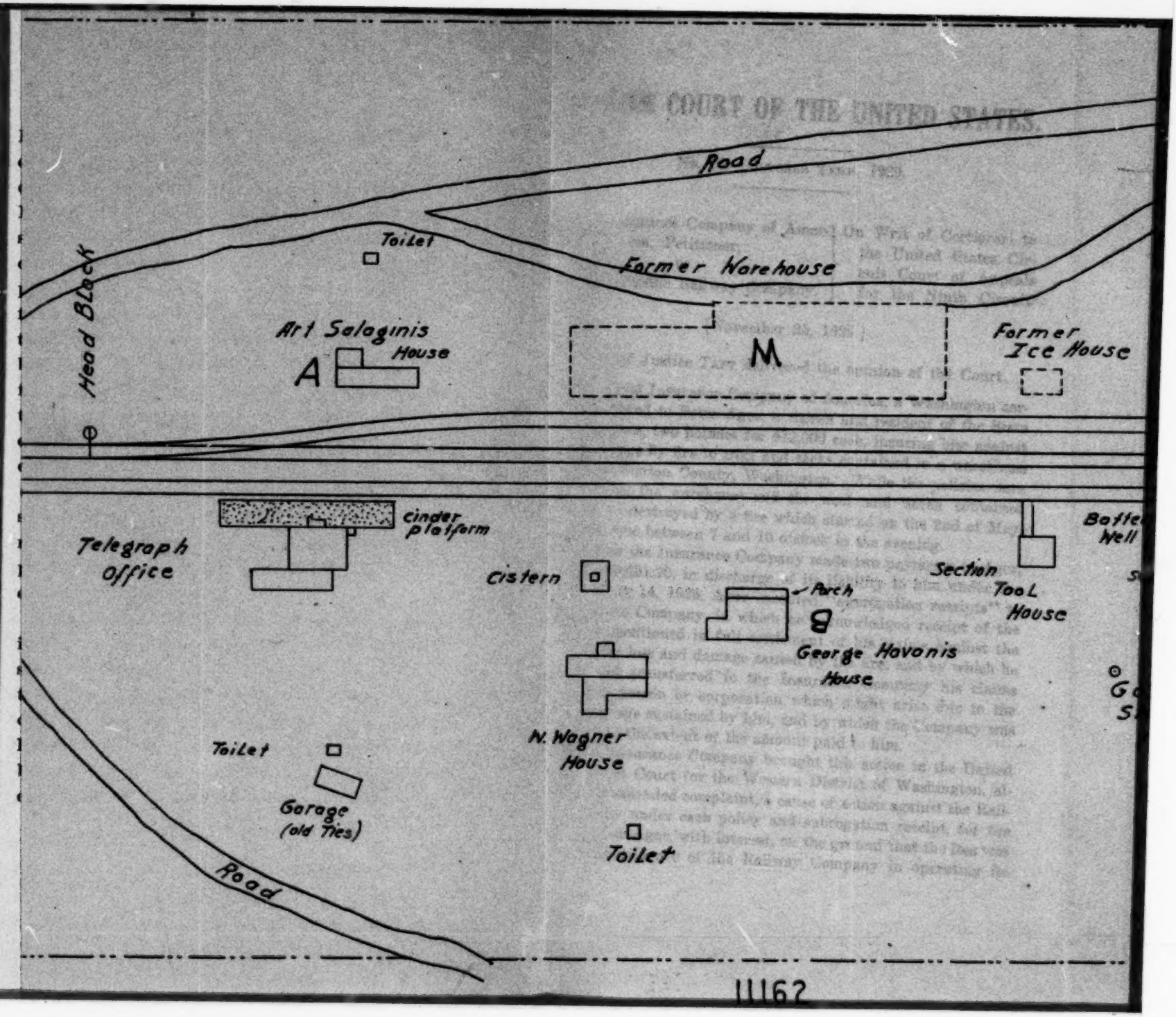
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Road
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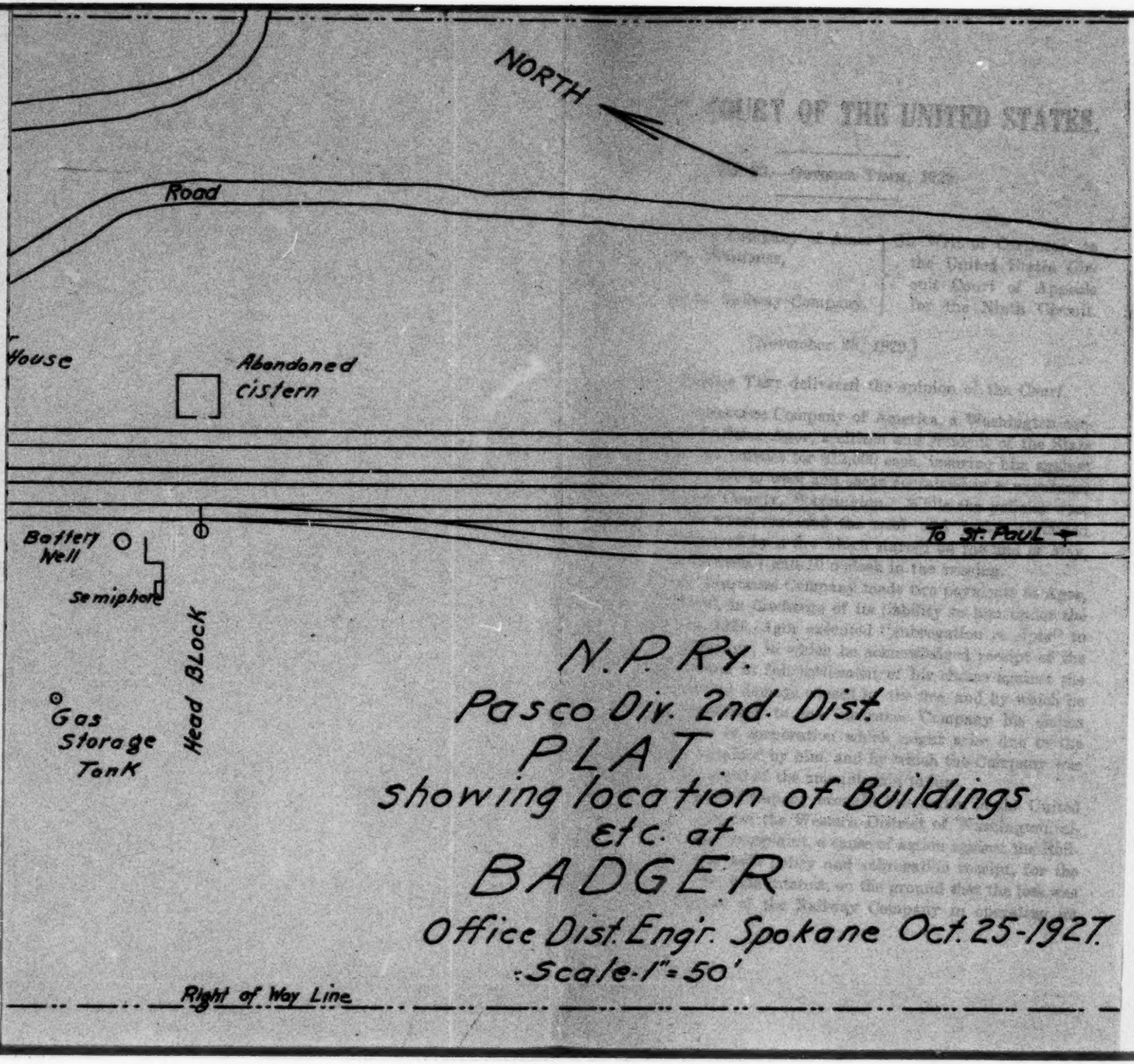
NORTH
Road
House
Abandoned
cistern
Battery
Well
Semiphore
Head BLock
Gas
Storage
Tank
To St. Paul
N. P. Ry.
Pasco Div. 2nd. Dist.
PLAT
showing location of Buildings
etc. at
BADGER
Office Dist. Engr. Spokane Oct. 25-1927.
Scale-1"=50'
Right of Way Line

SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1929.

General Insurance Company of America, Petitioner, *vs.* Northern Pacific Railway Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 25, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The General Insurance Company of America, a Washington corporation, issued to Peter Agor, a citizen and resident of the State of Washington, two policies for $12,000 each, insuring him against loss or damage by fire to wool and sacks contained in a warehouse situated in Benton County, Washington. While the policies were in full force, the warehouse and the wool and sacks contained therein were destroyed by a fire which started on the 2nd of May, 1926, sometime between 7 and 10 o'clock in the evening.

Thereafter the Insurance Company made two payments to Agor, totalling $20,481.90, in discharge of its liability to him under the policies. May 14, 1926, Agor executed "subrogation receipts" to the Insurance Company, in which he acknowledged receipt of the sum above mentioned in full settlement of his claims against the Company for loss and damage caused by the fire, and by which he assigned and transferred to the Insurance Company his claims against any person or corporation which might arise due to the loss and damage sustained by him, and by which the Company was subrogated to the extent of the amount paid to him.

Then the Insurance Company brought this action in the United States District Court for the Western District of Washington, alleging, in its amended complaint, a cause of action against the Railway Company under each policy and subrogation receipt, for the amount paid to Agor, with interest, on the ground that the loss was due to the negligence of the Railway Company in operating its railroad.

The Railway Company denied that it was responsible for the fir or was guilty of negligence in respect to it.

Trial was had; four witnesses were sworn and examined for th plaintiff, and the plaintiff rested. The counsel for the defendan moved for a non-suit. The motion was granted and a judgmen of dismissal entered. This was on the ground that the plaintif had failed to indicate any facts sufficient to show negligence on th part of the defendant as alleged, or at all. The Circuit Court o Appeals affirmed the judgment.

The facts were that the fire occurred at Badger in the State o Washington. Badger was a small station on the Northern Pacifi Railway southeast of Seattle, on the main line of the Company The warehouse which burned was 40 or 50 feet from the mai tracks. The warehouse was possibly 50 feet wide and 200 feet long The country about was sand and sagebrush. There was no blowin of the wind testified to, except at noon of the day of the fire. Th fire was between half-past seven and ten in the evening. Ther was no wind in the evening. A freight train of 70 cars passe going south between those hours. It was a double-header. Betwee Badger and the previous station, 7 miles away, there was a stif upgrade from north to south, and there was a good deal o puffing and smoke between the two stations. The evidence is quit clear, however, that for a measurable distance before the trai reached Badger the grade was either on the level or down hill There was no evidence of the presence of sparks from the engin at the time of the fire or during the evening. About twenty min utes after the train had passed Badger the fireman looked bac and remarked to the engineer that there seemed to be a fire burn ing up all Badger. Badger was a lonely station. There was n station house there. There were only three employees of the Rail way Company there and only three or four shacks beside the ware house. The fire occurred Sunday evening.

The chief witness called by the Insurance Company testified h went to bed about eight o'clock, that he was waked by the sectio foreman about ten o'clock. The fire had begun at the southwes corner of the warehouse some 50 feet away from the track, an when he saw it it was climbing from the ground up. The two o three men who were present were not able to do anything to pu

the fire out, and the building continued to burn until the next day. There is no other evidence of the circumstances under which the fire took place. The warehouse was one which could be opened by a key that was usually left in the lock or in a hole near the door. There was evidence that there were people who resorted to the warehouse and slept there at times — sheep shearers and others; but no testimony shows that at the time of the fire there was any blowing of tumble-weeds or other things which would convey fire. This is a case in which if negligence is to be presumed, it must arise from the mere passing of the train followed by a fire. Nothing shows negligence by the engineer, the fireman or the employees of the Railway Company. No one is able to suggest what it was that started the fire. There were many rats in the warehouse. There had been vagrants around it. At times people had seen tumble-weeds blown about in a wind, but nothing of this kind indicates an occasion for a fire at the time when it took place.

Counsel differ as to the law which should govern the decision in this case, whether Washington or Federal (so-called). In our judgment, it makes no difference.

A leading case in Washington is that of *Thorgrimson et al.* v. *Northern Pacific Company*, 64 Wash. 500. That was an action for damages by the owner of a roofing plant situated about 90 feet south of the main line of the railway company, and the theory of the suit was that the railway company had negligently operated its train past the plant and caused the fire which destroyed the property of the plaintiff.

The Supreme Court of the State said:

"The rule putting the burden on the railway company to explain the cause of a fire following a passing engine, to which this court is probably committed (Overacker *v.* Northern Pacific Railway Company, 117 Pac. 403, just decided) and which counsel relied on to carry the case to the jury on questions of equipment and operation, is one of necessity, and is applied so that justice may not be defeated. But we know of no cases going to the extent to which counsel would have us go to sustain their contention; that is, to presume negligence from the mere passing of the train followed by a fire. It is the proof of setting the fire, and not the fact that a building adjacent to a railroad right of way was burned, that raises the inference of negligence and shifts the burden of proof. In all the cases we have examined, including those from our own court, where the burden has been shifted from plaintiff to

defendant, there has been some evidence from which the jury might infer with reasonable certainty that the fire would not have occurred unless set by the passing train. Counsel admitted on the trial and appellants now admit that they have no evidence other than circumstantial evidence."

The facts of the case before us do not show anything more than the passing of the train and the existence of fire fifteen or twenty minutes afterwards. No connection is shown between the fire and the passing of the train except that of sequence. The principles of the Washington case cited would require a non-suit in this case.

Nor are the Federal cases any more favorable to the petitioner. In *McMullen* v. *Chicago & Northwestern Railway Company*, 101 Fed. 66, the action was to recover the value of property said to have been set on fire by sparks from the passing train on the defendant's road. The evidence was conflicting and the effect of the decision was that where there was conflicting evidence as to whether the fire was set by sparks from a passing train, the case should be held to be one for a jury, and one in which a presumption would arise from the fact of causing the fire that there was negligence to be charged to the company. But that case differs from the one at bar, for the reason that there was evidence there that the fire was occasioned by sparks from the engine. No such evidence appears here. There is entire absence of evidence here that the fire was created by the presence of any sparks.

Another Federal case is that of *Garrett* v. *Southern Railway Company*, 101 Fed. 102. It was there held by the Circuit Court of Appeals of the Sixth Circuit that in an action by a railroad company for damages from fire alleged to have been set by sparks from the defendant's locomotive, the burden was on the plaintiff to prove not only that the fire was caused by sparks from the defendant's engine but that the emission of such sparks was due to defendant's negligence.

In the present case we need not go so far. Both the circumstances that sparks caused the fire and that their presence was due to the negligence of the railroad company are absent. The case comes exactly within the rule laid down by this Court in the *Nitro-Glycerine* case, 15 Wall. 524, where Mr. Justice Field said:

"Outside of these cases in which a positive obligation is cast upon the carrier to perform safely a special service, the presump-

tion is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it. Here no such proof was made and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune."

We think the trial judge was right in granting a non-suit and the Circuit Court of Appeals in affirming it.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.